



Federal Register

**Wednesday,
June 16, 2010**

Part IV

**Department of
Defense**

**General Services
Administration**

**National Aeronautics
and Space
Administration**

**48 CFR Chapter 1, et al.
Federal Acquisition Regulation; Final
Rules**

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Chapter 1****[Docket FAR 2010–0076, Sequence 4]****Federal Acquisition Regulation;
Federal Acquisition Circular 2005–42;
Introduction****AGENCIES:** Department of Defense (DoD),
General Services Administration (GSA),and National Aeronautics and Space
Administration (NASA).**ACTION:** Summary presentation of rules.**SUMMARY:** This document summarizes
the Federal Acquisition Regulation
(FAR) rules agreed to by the Civilian
Agency Acquisition Council and the
Defense Acquisition Regulations
Council (Councils) in this Federal
Acquisition Circular (FAC) 2005–42. A
companion document, the *Small Entity
Compliance Guide* (SECG), follows this
FAC. The FAC, including the SECG, is
available via the Internet at [http://
www.regulations.gov](http://www.regulations.gov).**DATES:** For effective dates and comment
dates, see separate documents, which
follow.**FOR FURTHER INFORMATION CONTACT:** The
analyst whose name appears in the table
below in relation to each FAR Case.
Please cite FAC 2005–42 and the
specific FAR Case numbers. For
information pertaining to status or
publication schedules, contact the FAR
Secretariat at (202) 501–4755.**LIST OF RULES IN FAC 2005–42**

Item	Subject	FAR case	Analyst
I	American Recovery and Reinvestment Act (the Recovery Act) of 2009—Whistleblower Protections	2009–012	Parnell.
II	Electronic Subcontracting Reporting System (eSRS)	2005–040	Cundiff.
III	American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Publicizing Contract Ac- tions.	2009–010	Jackson.
IV	Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts—Section 844 of the National Defense Authorization Act for Fiscal Year 2008.	2008–003	Woodson.
V	Additional Requirements for Market Research (Interim)	2008–007	Blankenship.
VI	American Recovery and Reinvestment Act of 2009 (Recovery Act)—GAO/IG Access	2009–011	Chambers.
VII	New Designated Country—Taiwan	2009–014	Sakalos.
VIII	Nonavailable Articles	2009–013	Davis.
IX	Disclosure and Consistency of Cost Accounting Practices for Contracts Awarded to Foreign Con- cerns (Interim).	2009–025	Chambers.
X	Compensation for Personal Services (Interim)	2009–026	Chambers.
XI	Payrolls and Basic Records (Interim)	2009–018	Woodson.
XII	Technical Amendments.		

SUPPLEMENTARY INFORMATION:Summaries for each FAR rule follow.
For the actual revisions and/or
amendments made by these FAR cases,
refer to the specific item number and
subject set forth in the documents
following these item summaries.FAC 2005–42 amends the FAR as
specified below:**Item I—American Recovery and
Reinvestment Act (the Recovery Act) of
2009—Whistleblower Protections (FAR
Case 2009–012)**This rule adopts as final, with
changes, an interim rule published in
the **Federal Register** at 74 FR 14633 on
March 31, 2009, amending the FAR to
implement the American Recovery and
Reinvestment Act of 2009 (the Recovery
Act) with respect to section 1553 of
Division A, Protecting State and Local
Government and Contractor
Whistleblowers. This rule prohibits
non-Federal employers from
discharging, demoting, or
discriminating against an employee as a
reprisal for disclosing information.**Item II—Electronic Subcontracting
Reporting System (eSRS)(FAR Case
2005–040)**This rule amends the Federal
Acquisition Regulation (FAR) to adopt
as final, with changes, an interim FAR
rule published in the **Federal Register** at
73 FR 21779 on April 22, 2008,
amending the FAR to implement the use
of the Electronic Subcontracting
Reporting System (eSRS) to fulfill small
business subcontracting reporting
requirements. The eSRS, a web-based
system, replaces the Standard Forms
294 and 295 as the mechanism for
submitting reports required by the small
business subcontracting program. In
addition, this rule adds a new Alternate
III to FAR clause 52.219–9 to recognize
that there is a circumstance under
which contractors will need to use SF
294, rather than eSRS, to submit an
Individual Subcontract Report. The
contractor will use SF 294 if a contract
is not reported in the Federal
Procurement Data System because
reporting it in that system may disclose
information that would compromise
national security.**Item III—American Recovery and
Reinvestment Act of 2009 (the Recovery
Act)—Publicizing Contract Actions
(FAR Case 2009–010)**This rule adopts as final, with minor
changes, the interim rule published in
the **Federal Register** at 74 FR 14636 on
March 31, 2009. The interim rule
amended the FAR to implement section
6.2 of the Office of Management and
Budget (OMB) Memorandum M–09–10,
dated February 18, 2009, entitled “Initial
Implementing Guidance for the
American Recovery and Reinvestment
Act of 2009” (the Recovery Act). Section
6.2 of the OMB guidance mandates
accountability and transparency relative
to publicizing contract actions. The
OMB guidance requires that the FAR be
amended to reflect—

1. Unique requirements for posting of
pre-solicitation notices;
 2. Unique requirements for
announcing contract awards;
 3. Unique requirements for entering
awards into the Federal Procurement
Data System (FPDS); and
 4. Unique requirements for actions
that are not fixed-price or competitive.
- OMB Memorandum M–09–15, dated
April 3, 2009, entitled “Updated

Implementing Guidance for the American Recovery and Reinvestment Act of 2009,” supplements, amends, and clarifies the initial guidance in OMB Memorandum M–09–10. The final rule makes the following amendments:

- FAR 5.704(a)(2) to clarify that modifications of orders are not required to be publicized at the preaward stage.
- FAR 5.704(b) to require contracting officers to identify proposed contract actions, funded in whole or in part by the Recovery Act, by using the instructions that are at FAR 5.704(b) and available in the Recovery FAQs at the GPE <https://www.fedbizopps.gov>.
- FAR 5.704(c) and 5.705(a) to ensure that the description required by FAR 5.207(a)(16) clearly defines the elements of the requirement to the general public.
- FAR 5.705(b) to require contracting officers to include in the description of the contract action a statement specifically noting if the action was not awarded competitively, or was not fixed-price, or was neither competitive nor fixed-price.

Item IV—Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts—Section 844 of the National Defense Authorization Act for Fiscal Year 2008 (FAR Case 2008–003)

This final rule adopts, with changes, an interim rule published in the **Federal Register** at 74 FR 2731 on January 15, 2009. The rule amends the FAR to implement the requirements of Section 844 of the National Defense Authorization Act for Fiscal Year 2008. The interim rule required the head of an executive agency to make certain justification and approval documents relating to the use of noncompetitive procedures in Federal contracting be posted on the website of an agency and through FedBizOpps. The final rule requires that if the justification is a brand name justification under FAR 6.302–1(c) then it must be posted with the solicitation. Justifications must remain posted for a minimum of 30 days. The final rule clarifies that posting the justification does not apply if it would disclose the executive agency’s needs and disclosure of such needs would compromise national security or create other security risks. The final rule also establishes procedures at FAR 13.501 similar to procedures at FAR 6.305. The rule is intended to enhance competition in Federal contracting and provide greater transparency to the taxpayer.

Item V—Additional Requirements for Market Research (FAR Case 2008–007) (Interim)

This interim rule amends the FAR at parts 10, 44, and 52 by adding market research requirements. This change implements Section 826 of Pub. L. 110–181, the National Defense Authorization Act for Fiscal Year 2008 (FY08 NDAA). As a matter of policy, this provision of law is applied to contracts awarded by all executive agencies. This rule requires that market research must be accomplished before an agency places an indefinite-delivery/indefinite-quantity (ID/IQ) task or delivery order in excess of the simplified acquisition threshold. In addition, a prime contractor with a contract in excess of \$5 million for the procurement of items other than commercial items is required to conduct market research before making purchases that exceed the simplified acquisition threshold when the contractor is acting as a purchasing agent for the Government. This interim rule is applicable to any solicitations issued and contracts (to include any subcontracts issued under such contracts) awarded on or after the effective date of the rule.

Item VI—American Recovery and Reinvestment Act of 2009 (Recovery Act)—GAO/IG Access (FAR Case 2009–011)

This final rule adopts, with changes, the interim rule published in the **Federal Register** at 74 FR 14646 on March 31, 2009. This final rule amends the FAR to implement sections 902, 1514, and 1515 of the American Recovery and Reinvestment Act of 2009 (Recovery Act). Collectively, these sections provide for the audit and review of both contracts and subcontracts, and the ability to interview such contractor and subcontractor personnel under contracts containing Recovery Act funds.

These Recovery Act provisions are implemented in new alternate clauses to FAR 52.212–5 “Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items” and FAR 52.214–26 “Audit and Records—Sealed Bidding,” and by amending FAR 52.215–2 “Audit and Records—Negotiation.” For the Comptroller General, these alternate clauses provide specific authority to audit contracts and subcontracts and to interview contractor and subcontractor employees under contracts using Recovery Act funds. Agency Inspector Generals receive the same authorities, with the exception of interviewing subcontractor employees.

The changes to the interim rule clarify its application to supplemental agreements, and orders under task- or delivery-order contracts, involving Recovery Act funds.

Item VII—New Designated Country—Taiwan (FAR Case 2009–014)

This final rule adopts as final, without change, an interim rule implementing the designation of Taiwan under the World Trade Organization Agreement on Government Procurement, which took effect on July 15, 2009. This FAR change allows contracting officers to purchase goods and services made in Taiwan without application of the Buy American Act if the acquisition is covered by the World Trade Organization Agreement on Government Procurement.

Item VIII—Nonavailable Articles (FAR Case 2009–013)

This final rule amends FAR 25.104(a) to add certain items to the list of articles not available from domestic sources in sufficient and reasonably available commercial quantities of a satisfactory quality. This case is based on extensive market research by the Defense Logistics Agency. Unless the contracting officer learns before the time designated for receipt of bids in sealed bidding or final offers in negotiation that an article on the list is available domestically in sufficient and reasonably available quantities of a satisfactory quality, the Buy American Act does not apply to acquisition of these items as end products, and the contracting officer may treat foreign components of the same class or kind as domestic components.

Item IX—Disclosure and Consistency of Cost Accounting Practices for Contracts Awarded to Foreign Concerns (FAR Case 2009–025) (Interim)

This interim rule amends the FAR to align the existing FAR clause 52.230–4 with the changes made in Cost Accounting Standards (CAS) Board clause, Disclosure and Consistency of Cost Accounting Practices—Foreign Concerns.

On March 26, 2008, the CAS Board published, without change from the proposed rule (72 FR 32829, June 14, 2007), a final rule in the **Federal Register** at 73 FR 15939 to utilize the clause, Disclosure and Consistency of Cost Accounting Practices—Foreign Concerns, in CAS-covered contracts and subcontracts awarded to foreign concerns. This rule is necessary in order to maintain consistency between CAS and FAR in matters relating to the administration of CAS.

Item X—Compensation for Personal Services (FAR Case 2009–026) (Interim)

This interim rule amends the FAR to align the existing FAR 31.205(q)(2)(i) and (ii) with the changes made in Cost Accounting Standards (CAS) Board Standards 412, “Cost Accounting Standard for composition and measurement of pension cost,” and 415, “Accounting for the cost of deferred compensation.” Formerly, the applicable CAS standard for measuring, assigning, and allocating the costs of Employee Stock Ownership Plans (ESOPs) depended on whether the ESOP met the definition of a pension plan at FAR 31.001. Costs for ESOPs meeting the definition of a pension plan at FAR 31.001 were covered by CAS 412, while the costs for ESOPs not meeting the definition of a pension plan at FAR 31.001 were covered by CAS 415. Now, regardless of whether an ESOP meets the definitions of a pension plan at FAR 31.001, all costs of ESOPs are covered by CAS 415.

Item XI—Payrolls and Basic Records (FAR Case 2009–018) (Interim)

This interim rule implements changes that the Department of Labor (DOL) instituted regarding the submission of payroll data in their final rule, Protecting the Privacy of Workers: Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction, published in the **Federal Register** at 73 FR 77504 on December 19, 2008. The rule revises FAR 52.222–8, Payrolls and Basic Records, to delete the requirement for submission of full social security numbers and home addresses of individual workers, prime contractor, on weekly payroll transmittals as required on covered construction contracts. The rule requires contractors and subcontractors to maintain the full social security number and current address of each covered worker, and shall provide them upon request to the contracting officer, the contractor, or the Wage and Hour Division of the DOL for purposes of an investigation or audit of compliance with prevailing wage requirements. The rule recognizes DOL’s finding that complete social security numbers and home addresses for individual workers is personal information to the worker and that any unnecessary disclosure and submittal of such information creates an exposure to identity theft and the invasion of privacy for workers.

Item XII—Technical Amendments

Editorial changes have been made at FAR 31.205–6, 31.205–16, 49.505, and 52.222–34.

Dated: June 2, 2010.

Edward Loeb,

Acting Director, Acquisition Policy Division.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2005-42 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2005-42 is effective June 16, 2010, except for Items II, III, IV, VI, and VIII which are effective July 16, 2010.

Dated: June 8, 2010.

Shay D. Assad,

Director, Defense Procurement and Acquisition Policy.

Dated: June 2, 2010.

Edward Loeb,

Acting Senior Procurement Executive, Office of Acquisition Policy, U.S. General Services Administration.

Dated: June 3, 2010.

William P. McNally,

Assistant Administrator for Procurement, National Aeronautics and Space Administration.

[FR Doc. 2010–14184 Filed 6–15–10; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE**GENERAL SERVICES ADMINISTRATION****NATIONAL AERONAUTICS AND SPACE ADMINISTRATION****48 CFR Parts 3 and 52**

[FAC 2005–42; FAR Case 2009–012; Item I; Docket 2009–0009, Sequence 1]

RIN 9000–AL19

Federal Acquisition Regulation; FAR Case 2009–012, American Recovery and Reinvestment Act (the Recovery Act) of 2009— Whistleblower Protections

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense

Acquisition Regulations Council (the Councils) have adopted as final, with changes, an interim rule amending the Federal Acquisition Regulation (FAR) to implement the American Recovery and Reinvestment Act of 2009 (the Recovery Act) with respect to section 1553 of Division A, Protecting State and Local Government and Contractor Whistleblowers. This rule prohibits non-Federal employers from discharging, demoting, or discriminating against an employee as a reprisal for disclosing information.

DATES: *Effective Date:* June 16, 2010.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Jeritta Parnell, Procurement Analyst, at (202) 501–4082. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–42, FAR Case 2009–012.

SUPPLEMENTARY INFORMATION:**A. Background**

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 74 FR 14633 on March 31, 2009, to implement the Recovery Act with respect to section 1553 of Division A, Protecting State and Local Government and Contractor Whistleblowers. A Technical Amendment was published in the **Federal Register** at 74 FR 22810 on May 14, 2009.

The comment period closed on June 1, 2009. Six comments from two respondents were received. The Councils considered the comments received and concluded that the interim rule should be converted to a final rule with minor changes.

The comments received are discussed below.

a. The first respondent submitted the following 4 comments.

Comment 1. The respondent believes that the prescription at FAR 3.907–7 is too broad and should be revised to limit application more specifically to work funded with the Recovery Act funds. Revised language is proposed for FAR 3.907–7 as follows: “Use the clause at 52.203–15, Whistleblower Protections under the ARRA of 2009 in—All solicitations and contracts entirely funded with Recovery Act funds; and All solicitations and contracts funded in part with Recovery Act funds for the work to be funded with those Recovery Act funds.”

Response. Section 1553 prohibits reprisals against any employee of a contractor receiving “covered funds” for disclosing certain information related to “covered funds.” The limitation of the applicability of the rule is created by the

definition of covered information, which means only information that the employee reasonably believes is evidence of gross mismanagement of the contract or subcontract related to covered funds, gross waste of covered funds, a substantial and specific danger to public health or safety related to the implementation or use of covered funds, an abuse of authority related to the implementation or use of covered funds, or a violation of law, rule, or regulation related to an agency contract (including the competition for or negotiation of a contract) awarded or issued relating to covered funds. It does not apply to information relating to problems not associated with the use of covered funds.

Section 1553 defines "Covered funds" to mean any contract, grant, or other payment received by a contractor if—

(1) The Federal Government provides any portion of the money or property that is provided, requested, or demanded; and

(2) At least some of the funds are appropriated or otherwise made available by the Recovery Act.

As defined in section 1553, covered funds is broader than just funds appropriated or otherwise made available by the Recovery Act.

Since the prohibition of reprisals applies to any employee of the contractor receiving the covered funds, the clause prescription as stated in the interim rule at FAR 3.907–7 is correct. However, the Councils have revised the definition of "covered funds" at FAR 3.907–1 to be more consistent with the statutory definition, and have revised the flowdown in the clause at FAR 52.203–15(b) to apply only to subcontracts that are funded in whole or in part with the Recovery Act funds.

Comment 2. The respondent states that because section 1553 of the Recovery Act is implemented by FAR 52.203–15 and included in contracts for commercial items by FAR 52.212–5(b)(3), it is not necessary to amend paragraph (r) of FAR 52.212–4.

Response. The Councils agree. The newly added language at FAR 52.212–4(r) is deleted.

Comment 3. The respondent states that the clause at FAR 52.203–15 should be indicated as a "check-off" clause as has been noted for FAR 52.212–5(b)(4), and FAR 52.204–11 (FAR Case 2009–009).

Response. The Councils agree. However, it is not necessary to make any further changes to the rule. This is a checklist being interpreted correctly by the U.S. National Archives and Records Administration and the U.S. Government Printing Office.

Comment 4. The respondent states that it is unnecessary to include the reference to FAR 52.203–15 in paragraph (e)(1) of FAR 52.212–5 because this was incorporated under FAR Case 2009–011.

Response. The Councils partially agree. The Technical Amendment to the rule, published in the **Federal Register** at 74 FR 22810 on May 14, 2009, moved this paragraph to the Alternate II.

b. The second respondent submitted 2 comments to the interim rule.

Comment 1. The respondent believes that the rule should be amended to require the contracting officer to immediately forward the complaint ONLY to the Office of Inspector General (OIG).

Response. The Councils partially agree. The language in FAR 3.907–3(c) is revised to add "and to other designated officials in accordance with agency procedures (e.g., agency legal counsel)" so that agencies are informed as well as the OIG.

Comment 2. The respondent believes that the Recovery Act grants authority concerning the extension of time for investigating complaints and the determination on whether or not to investigate or to discontinue an investigation to the IG, not to the agency head as stated in FAR 3.907–6(c)(1).

Response. The Councils agree that subsection (b) of section 1553 gives the authority to the IG. However, FAR 3.907–6(c)(1) reflects the wording of subsection (c)(3) of section 1553. The FAR did not create any new authority here.

In addition, the Councils added a reference, at FAR 52.203–15, to the web address where contractors may obtain a whistleblower poster developed by the Recovery Accountability and Transparency (RAT) Board.

This is a significant regulatory action and, therefore, was subject to Office of Management and Budget review under section 6 of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule applies similar, but not identical, whistleblower protections to contractor and subcontractor employees as currently covered in FAR subpart 3.9.

Likewise, this rule only applies to contracts awarded with Recovery Act funds.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. chapter 35, *et seq.*

List of Subjects in 48 CFR Parts 3 and 52

Government procurement.

Dated: June 2, 2010.

Edward Loeb,

Acting Director, Acquisition Policy Division.

■ Accordingly, the interim rule published in the **Federal Register** at 74 FR 14633 on March 31, 2009, is adopted as a final rule with the following changes:

■ 1. The authority citation for 48 CFR parts 3 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

■ 2. Amend section 3.907–1 by revising the definition of "Covered funds" to read as follows:

3.907–1 Definitions.

* * * * *

Covered funds means any contract payment, grant payment, or other payment received by a contractor if—

(1) The Federal Government provides any portion of the money or property that is provided, requested, or demanded; and

(2) At least some of the funds are appropriated or otherwise made available by the Recovery Act.

* * * * *

■ 3. Amend section 3.907–3 by revising paragraph (c) to read as follows:

3.907–3 Procedures for filing complaints.

* * * * *

(c) A contracting officer who receives a complaint of reprisal of the type described in 3.907–2 shall forward it to the Office of Inspector General and to other designated officials in accordance with agency procedures (e.g., agency legal counsel).

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Amend section 52.203–15 by revising the date of the clause, and paragraphs (a) and (b) to read as follows:

52.203–15 Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009.

* * * * *

WHISTLEBLOWER PROTECTIONS UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 (JUN 2010)

(a) The Contractor shall post notice of employees rights and remedies for whistleblower protections provided under section 1553 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act).

(b) The Contractor shall include the substance of this clause, including this paragraph (b), in all subcontracts that are funded in whole or in part with Recovery Act funds.

* * * * *

52.212–4 [Amended]

■ 5. Amend section 52.212–4 by removing the clause date “(Mar 2009)” and adding “(JUN 2010)” and removing from paragraph (r) “Section 1553 of the American Recovery and Reinvestment Act of 2009 relating to whistleblower protections for contracts funded under that Act;”.

■ 6. Amend section 52.212–5 by—

■ a. Revising the date of the clause;

■ b. Removing from paragraph (b)(3) “(Mar 2009)” and adding “(JUN 2010)” in its place; and

■ c. Revising paragraph (e)(1)(ii)(B) of Alternate II.

The revised text reads as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS (JUN 2010)

* * * * *

Alternate II * * *

* * * * *

(e)(1) * * *

(ii) * * *

(B) 52.203—15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (JUN 2010) (Section 1553 of Pub. L. 111–5).

* * * * *

■ 7. Amend section 52.213–4 by revising the date of the clause and paragraph (a)(2)(vi) to read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

TERMS AND CONDITIONS—SIMPLIFIED ACQUISITIONS (OTHER THAN COMMERCIAL ITEMS) (JUN 2010)

(a) * * *

(2) * * *

(vi) 52.244–6, Subcontracts for Commercial Items (JUN 2010).

* * * * *

■ 8. Amend section 52.244–6 by revising the date of the clause and paragraph (c)(1)(ii) to read as follows:

52.244–6 Subcontracts for Commercial Items.

* * * * *

SUBCONTRACTS FOR COMMERCIAL ITEMS (JUN 2010)

* * * * *

(c)(1) * * *

(ii) 52.203–15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (JUN 2010) (Section 1553 of Pub. L. 111–5), if the subcontract is funded under the Recovery Act.

* * * * *

[FR Doc. 2010–14189 Filed 6–15–10; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 4, 19, 52, and 53

[FAC 2005–42; FAR Case 2005–040; Item II; Docket 2008–0001, Sequence 26]

RIN 9000–AK95

Federal Acquisition Regulation; FAR Case 2005–040, Electronic Subcontracting Reporting System (eSRS)

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are issuing a final rule amending the Federal Acquisition Regulation (FAR) to require that contractors' small business subcontract reports be submitted using the Electronic Subcontracting Reporting System (eSRS), rather than Standard Form 294 - Subcontract Report for Individual Contracts and Standard Form 295 - Summary Subcontract Report.

DATES: *Effective Date:* July 16, 2010.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Rhonda Cundiff, Procurement Analyst, at (202) 501–0044. For information pertaining to status or publication

schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–42, FAR Case 2005–040.

SUPPLEMENTARY INFORMATION:

A. Background

The Councils published an interim rule in the **Federal Register** at 73 FR 21779 on April 22, 2008, to implement in the FAR the use of the Electronic Subcontracting Reporting System (eSRS) to fulfill small business subcontracting reporting requirements. The eSRS is a web-based system under the umbrella of the Integrated Acquisition Environment. It replaces Standard Forms 294 and 295 as the mechanism for submitting reports required by the small business subcontracting program. The eSRS is intended to streamline the small business subcontracting program reporting process and provide the data to agencies in a manner that will enable them to more effectively manage the program.

The interim rule also amended FAR subpart 19.7 and related clauses to clarify existing small business subcontracting program requirements.

The FAR interim rule was not intended to change any of the requirements for the individual or summary subcontract reports. Its purpose was only to require submission of subcontract reports electronically, rather than in hardcopy.

Nineteen commenters submitted comments on the interim rule. A discussion of those comments and the changes made to the rule as a result of those comments is provided below.

The comments will be discussed in three overall categories. Those that pertain to the FAR rule itself, those that do not pertain to the FAR rule, and those that were submitted in response to the Councils' question in the **Federal Register** notice for the interim rule concerning whether the reporting period covered by a Summary Subcontract Report for a commercial subcontracting plan should remain the Government's fiscal year, or be the contractor's fiscal year.

The comments submitted that did not pertain to the FAR rule itself covered such things as changes that need to be made to eSRS to ensure that the instructions in that electronic system are consistent with this FAR rule, changes that need to be made to electronic business systems that interface with eSRS, and changes that need to be made to regulations that supplement the FAR. These comments will be referred to the appropriate Government officials for their consideration. These comments will not be addressed individually in this

Federal Register notice, except when it is necessary to address them in order to clarify existing policy.

Comments pertaining to the FAR rule.

Comment: One commenter recommended revising FAR 19.704(a)(10)(v) and 19.704(a)(10)(vi) by replacing “Government or Contractor official” with “Government official (for SSRs) and the Prime’s Contracting official (for ISRs).” The reason for the change is that the Government reviews all Summary Subcontract Reports (SSRs) submitted by prime contractors and subcontractors, and whoever awarded the contract/subcontract is responsible for acknowledging receipt of, or rejecting, the Individual Subcontract Report (ISR). The contractor, therefore, must provide both the Government official’s and the prime’s contracting official’s e-mail address to be consistent with FAR 19.705–6(h) and FAR 52.219–9(l)(1)(iii)(B) for ISRs, and (1)(2)(F) for SSRs.

Response: The Councils concur that both e-mail addresses need to be provided to subcontractors with subcontracting plans since these subcontractors will be required to submit both an ISR and an SSR. The Councils further believe that the proposed revisions to FAR 19.704 will make this aspect of the rule clearer and have revised the language in the final rule accordingly. The contractor must provide the email address of the official responsible for acknowledging receipt of or rejecting the reports, to be consistent with FAR 19.705–6(h) and FAR 52.219–9(l)(1)(iii)(B) for ISRs, and 52.219–9(l)(2)(F) for SSRs. Similar changes have been made to 52.219–9(d)(10)(v) and (vi).

Comment: Two commenters recommended revising the second sentence in FAR 19.705–6(h) to provide examples of what constitutes a report not being adequately completed (*i.e.*, errors, omissions, and incomplete data).

Response: Concur. The Councils believe that adding a list of examples such as, “errors, omissions, and incomplete data”, should help clarify what is meant by not adequately completed. FAR 19.705–6(h) has been revised accordingly in the final rule.

Additionally, it should be noted that acknowledging receipt does not mean acceptance or approval of the report.

Comment: One commenter questioned the need to clarify in FAR clause 52.219–9 that “subcontracting plans are not required from subcontractors when the prime contract contains the FAR clause at 52.212–5, Contract Terms and Conditions Required to Implement

Statutes or Executive Orders—Commercial Items”. The commenter believes that FAR clause 52.219–9 should be included in contracts for commercial items.

Response: The clarification is consistent with FAR 52.212–5(e)(1) “Notwithstanding the requirements of the clauses in paragraphs (a), (b), (c), and (d) of this clause, the Contractor is not required to flow down any FAR clause, other than those in this paragraph (e)(1) in a subcontract for commercial items.” The current FAR clause 52.212–5(e)(1) includes FAR clause 52.219–8 but does not include clause 52.219–9.

Comment: One commenter proposes changing FAR 52.219–9(l)(1) in order to make it consistent with FAR 19.705–6, Postaward Responsibilities of the Contracting Officer, and to enforce the cut-off date for report submission. The commenter recommends changing FAR 52.219–9(l)(1) from: “(1) ISR. This report is not required for commercial plans. The report is required for each contract containing an individual subcontract plan and shall be submitted to the Administrative Contracting Officer (ACO) or Contracting Officer, if no ACO is assigned,” to: “(1) ISR. The report is required for each contract containing an individual subcontract plan and shall be submitted to the contracting officer who approved the subcontracting plan. Failure to submit or late submission of reports shall be a breach of contract and will be documented as past performance for future acquisitions.”

Response: Partially concur. The Councils do not agree with adding the sentence concerning failure to submit or late submission of reports. Paragraph (k)(2) of FAR clause 52.219–9 already addresses the breach of contract issue when the contractor or subcontractor fails to comply in good faith with the approved subcontracting plan. Reporting is an element of the plan.

Although the Councils have not adopted the changes that the commenter has recommended to the first two sentences in this paragraph of the interim rule, the Councils have revised the language in the final rule so that this paragraph does not address to whom the ISR is submitted. That issue is already adequately addressed in paragraph (l)(1)(iii) of FAR clause 52.219–9 and does not need to be addressed in paragraph (l)(1). Paragraph (l)(1)(iii) of FAR clause 52.219–9 is completely consistent with FAR 19.705–6(h).

Comment: One commenter recommended revising the second sentence of FAR clause 52.219–9(l)(1) to read, “The report is required for each contract containing an individual

subcontracting plan and shall be submitted to the Contracting Officer from the Government agency who awarded the prime contract or as prescribed by agency regulations.” The commenter stated that the rationale for this revision is to make this paragraph of the clause consistent with paragraphs (l)(1)(iii)(A) and (l)(2)(i)(F) of the clause. These paragraphs state that the authority to acknowledge receipt or reject ISRs resides with the Contracting Officer, and for SSRs resides with the Government agency awarding the prime contracts.

Response: Nonconcur. The Councils believe it is not necessary for this sentence to address to whom the report is submitted. That issue is already adequately addressed in paragraph (l)(1)(iii) of FAR clause 52.219–9 and does not need to be addressed in paragraph (l)(1) of the clause. Accordingly, this sentence has been revised in the final rule and now reads, “The report is required for each contract containing an individual subcontract plan.”

Comment: One commenter recommended revising FAR 52.219–9(l)(2)(i)(F) to read, “The authority to acknowledge or reject SSRs in eSRs including SSRs submitted by subcontractors with subcontracting plans, resides with the Government agency awarding prime contracts or as prescribed in agency regulations.” The rationale the commenter provided for adding the words, “or as prescribed in agency regulations,” is that the DoD Comprehensive Subcontracting Plan (Test Program) covers all Military Service and Defense Agency contracts. The Defense Contract Management Agency has the responsibility to perform management and oversight of plans included in this program, as delegated by the Military Services and Defense Agencies. Therefore, the Government agency awarding the prime contract would not be the entity acknowledging or rejecting SSRs under the DoD Comprehensive Subcontracting (Test Program).

Response: The Councils do not agree with adding the words, “or as prescribed in agency regulations” to this paragraph in the FAR clause. The Councils have, however, revised the language in the final rule to add the words, “unless stated otherwise in this contract.” This language will alert the contractor to the fact that although authority to acknowledge or reject SSRs resides with the Government agency awarding the contracts, that agency may delegate the authority to another agency, but if this occurs, the information on what

Government entity has the authority will be contained in the contract itself.

Comment: One commenter stated that paragraph (d)(10)(iii) of FAR clause 52.219-9, Small Business Subcontracting Plan, adds the requirement to report information for Historically Black Colleges and Universities and Minority Institutions (HBCU/MI); however, HBCU/MIs are not included elsewhere in the clause when the clause references the various programs (*i.e.*, small business, HUBZones, *etc.*) and what should be contained in a subcontracting plan.

Paragraphs (c), (d)(1) to (9), (d)(11), (e), and Alternates I and II, refer to the requirements of a subcontracting plan. Defense Federal Acquisition Regulation Supplement (DFARS) 226.370-8, Goals and incentives for subcontracting with HBCU/MIs, states that when reviewing subcontracting plans submitted under FAR clause 52.219-9, Small Business Subcontracting Plan, the contracting officer shall ensure the contractor included awards to HBCU/MIs in the Small Disadvantaged Business (SDB) goal. In addition, DFARS 219.704, Subcontracting plan requirements, states the SDB goal shall include subcontracts with HBCU/MI, in addition to subcontracts with SDB concerns.

There is a disconnect between what is required on the report for the Department of Defense, Coast Guard, and National Aeronautics and Space Administration and what is required in the subcontracting plan. Recommend either including or deleting HBCU/MI throughout the clause for consistency. If deleting from the FAR clause, consider including coverage in the DFARS.

Response: The commenter states that the rule added the requirement to report information for HBCUs/MIs and suggests revising FAR clause 52.219-9 to add HBCUs/MIs to the entities listed in the requirements for subcontracting plans, or remove the reference to HBCUs/MIs in the reporting requirements. The commenter states that either proposed change would make the language consistent with the other parts of the clause.

The Councils do not concur. This rule did not add the requirement to report information for HBCUs/MIs. The language in FAR clause 52.219-9(d)(10)(iii) concerning reporting subcontract awards to HBCUs/MIs was already in the FAR. The requirement was already in place for the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration. Standard Forms 294 and 295 both required these departments to report on awards to HBCUs/MIs.

The purpose of this rule is only to require the use of eSRS rather than Standard Forms 294 and 295, it is not to change any of the requirements for subcontracting plans or subcontract reports.

Comment: One commenter recommended modifying the second sentence in paragraph (l)(2)(iii) of FAR clause 52.219-9, Small Business Subcontracting Plan, to read, "The report, which can be submitted into eSRS, shall include..."

Response: Nonconcur. The Councils believe that the addition of this language is unnecessary and would lead to confusion. The Year-End Supplementary Report for Small Disadvantaged Businesses is a part of the SSR that is submitted at the close of each fiscal year. The SSR is submitted using eSRS. There is nothing in the FAR that provides for the Year-End Supplementary Report for Small Disadvantaged Businesses to be submitted in any way other than by using eSRS. If the words, "which can be submitted into eSRS," were added to the second sentence in FAR clause 52.219-9(l)(2)(iii), it would suggest that there is some other means for submitting this information and there is not.

Comment: One commenter recommended removing the last sentence of paragraph (b) of FAR clause 52.219-25, Small Disadvantaged Business Participation Program—Disadvantaged Status and Reporting, and replacing it with the following: "If this contract contains an Individual Small Business Subcontracting Plan, reports shall be submitted with the final Individual Subcontract Report into eSRS at the completion of the contract." The commenter indicated that in this instance where the contractors will be using eSRS to submit the Individual Subcontract Report (ISR) it would be consistent to require the contractors to use eSRS to submit the Small Disadvantaged Business Participation Report. The commenter indicated that having the information submitted electronically would facilitate access to the information by multiple Government organizations.

Response: Nonconcur. The Councils do not believe it is necessary to require that the Small Disadvantaged Business Participation Report be submitted using eSRS when it is submitted with the final ISR. It is already likely that in this instance contractors will use eSRS to submit the Small Disadvantaged Business Participation Report, since it is expected to be a less burdensome means of submitting that report for contractors who are also submitting an ISR. Further, not all contractors required to submit

Small Disadvantaged Business Participation Reports will also be required to submit ISRs, so this revision would not result in uniform electronic submission of the Small Disadvantaged Business Participation Report. The benefits to the Government of having the reports submitted electronically are not as great if not all of the reports are required to be submitted in that manner. Therefore, the Councils do not believe that revising the language in the interim rule to require some contractors to submit the Small Disadvantaged Business Participation Report in a particular manner is warranted.

Comment: One commenter has suggested revising paragraph (d)(10)(iii) of FAR clause 52.219-9 to include "Alaska Native Corporations and Indian Tribes that are not Small Businesses" and "Alaska Native Corporations and Indian Tribes that have not been certified by the Small Business Administration as Small Disadvantaged Businesses" to be consistent with (d)(1)(i) of the clause.

Response: The Councils acknowledge the commenter's concern that paragraph (d)(1)(i) of FAR clause 52.219-9 is inconsistent with paragraph (d)(10)(iii). The Councils have revised paragraph (d)(10)(iii) in the final rule to clarify that awards to Alaska Native Corporations and Indian Tribes shall be reported as awards to small business and small disadvantaged business concerns.

Comment: One commenter stated that the first sentence in FAR 19.704(a)(2) should be revised to read "Submit a new commercial plan, 30 working days before the end of the contractor's fiscal year, or 30 days prior to the expiration of the current subcontracting plan to the contracting officer."

Response: The Councils do not concur. The commenter did not provide any rationale for making this change. FAR 19.704(a)(2) does not have to do with submitting commercial plans. The Councils believe the commenter means FAR 19.704(d)(2). The commercial subcontracting plan covers the contractor's fiscal year. Commercial plans, therefore, expire at the end of the contractor's fiscal year. Adding, "or 30 days prior to the expiration of the current subcontracting plan" would, therefore, be redundant.

Comment: One commenter stated that FAR 19.705-2(e) states that a contract may have no more than one plan. This will not work for 20 year multiple award contracts. The commenter recommended having a new individual plan prior to each 5 year option to allow for other changes in addition to goals (including a change in the point of contact, or the items that are being

subcontracted and the concerns that will receive the subcontracts, etc.)

Response: The Councils do not concur. The FAR language means that a contract may have no more than one plan at any given time. There should not be one plan that covers the contract at time of award and then additional plans covering work that is added to the contract after award.

A contracting officer may negotiate changes to the subcontracting plan whenever they are necessary. The FAR does not prohibit having the plan change during the course of the contract, it merely prohibits having more than one plan apply to the contract at a time.

Comment: One commenter indicated that the contracting officer is responsible for action on Individual Subcontract Reports and Summary Subcontract Reports (SSRs) in eSRS. The current General Services Administration, Office of Small Business Utilization, Agency Coordinator, has been delegated this function for SSRs in lieu of the contracting officer. The commenter wants the contracting officer that awards a commercial subcontracting plan to review SSRs for compliance. However, the commenter believes it is better to have a central point rather than each regional office responsible for accepting/rejecting the data which is sent to Congress.

Response: The Councils note the comment. The commenter did not provide any particular recommendations. It is necessary to have the contracting officer that approved the commercial subcontracting plan acknowledge receipt of, or reject, the SSR because that individual is responsible for the contractor complying with that subcontracting plan, and submitting the SSR is a requirement under the plan. Contracting officers, however, may delegate duties, as provided in agency procedures. Further, eSRS is the central point for collecting the data which is provided to Congress. Government personnel other than the individual that acknowledged receipt of the SSR can review the data in eSRS.

Comment that does not pertain to the FAR rule but which is being addressed in order to clarify existing policy.

Comment: One commenter believes there is a need to accommodate changing small business size status in eSRS. The commenter stresses the need to ensure that the Federal Procurement Data System—Next Generation (FPDS-NG), eSRS, and agency contract systems are properly updated in order to

ascertain whether a subcontracting plan is required, in the event that a company's size changes from large to small or vice versa, during contract performance.

Response: Non-concur. Although it is essential that the Central Contractor Registration, the Online Representations and Certifications Application and FPDS-NG reflect the current size status of the prime contractor, size status is no longer a consideration, in determining the need for a subcontracting plan, after contract award. The requirement for a subcontracting plan resides in the prime contract, and is contingent, among other things, on the size status of the prime contractor at the time of award. If the prime contractor was small at the time of award, there would have been no contractual requirement for a subcontracting plan. Even if the size status of the prime contractor were to change during contract performance, e.g., as a result of growth, a novation agreement, or a non-novated merger acquisition, the terms and conditions of the prime contract regarding the subcontracting plan will not change.

Likewise, if the prime contract was awarded to a business that was other than small and the terms and conditions of the prime contract included a requirement for a subcontracting plan, then this requirement for a subcontracting plan will remain unchanged for the life of the contract, regardless of whether the size status of the prime contractor changes.

Comments on whether the reporting period covered by a SSR for a Commercial Subcontracting Plan should remain the Government's fiscal year or be the contractor's fiscal year.

The purpose of the interim rule was to require that small business subcontract reports be submitted using the eSRS, rather than Standard Form 294 and Standard Form (SF) 295. The FAR interim rule was not intended to change any of the requirements for the individual or summary subcontract reports.

The interim rule retained the requirement that a commercial subcontracting plan cover the contractor's fiscal year but the time period covered by the year-end SSR submitted for that subcontracting plan covers the Government's fiscal year. It also retained the requirement that the year-end SSR for a commercial subcontracting plan be submitted 30 days after the end of the Government's fiscal year.

As stated above, the interim rule retained the FAR requirement (reflected in the SF 295) that the SSR must cover

subcontracting done during the Government's fiscal year.

However, the eSRS, which many agencies and contractors were already using, was deployed with instructions that informed the contractor that the year-end SSR for a commercial subcontracting plan should reflect subcontracting performed during the contractor's fiscal year. The eSRS instructions indicated that all other SSRs, those not tied to a commercial subcontracting plan, should cover the Government's fiscal year.

Since there was a discrepancy between the FAR and the instructions in eSRS itself, the **Federal Register** notice for the interim rule specifically solicited public comment on this issue.

The comments received in response to the question on what period the year-end SSR for a commercial plan should cover, the Government's fiscal year or the contractor's fiscal year, requires a review of the policy on commercial subcontracting plans and the year-end SSRs that are submitted for these plans.

The **Federal Register** notice for the interim rule stated that, "the Councils may consider adding further coverage in the FAR to mirror the instructions that are currently in SFs 294 and 295". The following sentence had been in SFs 294 and 295: "Only subcontracts involving performance in the U.S. or its outlying areas should be included in these reports". This sentence has been revised and added to FAR clause 52.219-9 to state "Only subcontracts involving performance in the United States or its outlying areas should be included in these reports with the exception of subcontracts under a contract awarded by the State Department or any other agency that has statutory or regulatory authority to require subcontracting plans for subcontracts performed outside the United States and its outlying areas."

Additionally, changes have been made to FAR parts 4, 19, and 53, and a new Alternate III added to FAR clause 52.219-9 to recognize that there is a circumstance under which contractors will need to use SF 294, rather than eSRS, to submit an ISR. If a contract is not reported in the FPDS because reporting it in that system may disclose information that would compromise national security, the contractor will use SF 294 to submit an ISR on that contract rather than submitting an ISR in eSRS.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule does not impose any new reporting, recordkeeping or other compliance requirements and the existing requirements pertain only to other than small businesses. The rule only requires that reports that were previously submitted in hardcopy now be submitted electronically.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104–13) applies because this final rule contains information collection requirements. Accordingly, the FAR Secretariat has forwarded a request for approval of a revision to the information collection requirements concerning OMB Control Number 9000–0006, Subcontracting Plans/Subcontracting Reporting for Individual Contracts, and OMB Control Number 9000–0007, Summary Subcontract Report, to the Office of Management and Budget under 44 U.S.C. chapter 35, *et seq.* Public comments concerning this request will be invited through a subsequent **Federal Register** notice.

List of Subjects in 48 CFR Parts 4, 19, 52, and 53

Government procurement.

Dated: June 2, 2010.

Edward Loeb,

Acting Director, Acquisition Policy Division.

■ Accordingly, the interim rule published in the **Federal Register** at 73 FR 21779 on April 22, 2008, is adopted as a final rule with the following changes:

■ 1. The authority citation for 48 CFR parts 1, 4, 19, 52, and 53 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 4—ADMINISTRATIVE MATTERS

■ 2. Amend section 4.606 by adding paragraph (c)(5) to read as follows:

4.606 Reporting Data.

* * * * *

(c) * * *

(5) Actions that, pursuant to other authority, will not be entered in FPDS (e.g., reporting of the information would compromise national security).

* * * * *

PART 19—SMALL BUSINESS PROGRAMS

■ 3. Amend section 19.704 by adding paragraphs (a)(10)(iii)(A) and (a)(10)(iii)(B), and revising paragraphs (a)(10)(v) and (a)(10)(vi) to read as follows:

19.704 Subcontracting plan requirements.

(a) * * *

(10) * * *

(iii) * * *

(A) The ISR shall be submitted semi-annually during contract performance for the periods ending March 31 and September 30. A report is also required for each contract within 30 days of contract completion. Reports are due 30 days after the close of each reporting period, unless otherwise directed by the contracting officer. Reports are required when due, regardless of whether there has been any subcontracting activity since the inception of the contract or the previous reporting period.

(B) The SSR shall be submitted as follows: For DoD and NASA, the report shall be submitted semi-annually for the six months ending March 31 and the twelve months ending September 30. For civilian agencies, except NASA, it shall be submitted annually for the twelve-month period ending September 30. Reports are due 30 days after the close of each reporting period.

* * * * *

(v) Provide its prime contract number, its DUNS number, and the e-mail address of the offeror's official responsible for acknowledging receipt of or rejecting the ISRs to all first-tier subcontractors with subcontracting plans so they can enter this information into the eSRS when submitting their ISRs; and

(vi) Require that each subcontractor with a subcontracting plan provide the prime contract number, its own DUNS number, and the e-mail address of the subcontractor's official responsible for acknowledging receipt of or rejecting the ISRs, to its subcontractors with subcontracting plans.

* * * * *

19.705–6 [Amended]

■ 4. Amend section 19.705–6 by removing from the third sentence in paragraph (h) “completed” and adding “completed, for instance, if there are errors, omissions, or incomplete data” in its place.

■ 5. Amend section 19.708 by revising paragraph (b)(1), and removing from paragraph (b)(2) “Alternate I or II.” and adding “Alternate I, II, or III.” in its place.

The revised text reads as follows:

19.708 Contract clauses.

* * * * *

(b)(1) Insert the clause at 52.219–9, Small Business Subcontracting Plan, in solicitations and contracts that offer subcontracting possibilities, are expected to exceed \$550,000 (\$1,000,000 for construction of any public facility), and are required to include the clause at 52.219–8, Utilization of Small Business Concerns, unless the acquisition is set aside or is to be accomplished under the 8(a) program. When—

(i) Contracting by sealed bidding rather than by negotiation, the contracting officer shall use the clause with its Alternate I.

(ii) Contracting by negotiation, and subcontracting plans are required with initial proposals as provided for in 19.705–2(d), the contracting officer shall use the clause with its Alternate II.

(iii) The contract action will not be reported in the Federal Procurement Data System pursuant to 4.606(c)(5), the contracting officer shall use the clause with its Alternate III.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 6. Amend section 52.212–5 by revising the date of the clause; removing from paragraph (b)(11)(i) “(Apr 2008)” and adding “(JUL 2010)” in its place; and adding paragraph (b)(11)(iv) to read as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS (JUL 2010)

* * * * *

(b) * * *

(11) * * *

____(iv) *Alternate III* (JUL 2010) of 52.219–9.

* * * * *

■ 7. Amend section 52.219–9 by—

■ a. Revising the date of the clause, and paragraphs (d)(10)(iii), (d)(10)(v), and (d)(10)(vi);

■ b. Adding a sentence to the end of paragraph (l) introductory text.

■ c. Removing from paragraph (l)(1) introductory text “and shall be submitted to the Administrative Contracting Officer (ACO) or Contracting Officer, if no ACO is assigned”;

■ d. Removing from paragraph (l)(2)(i)(F) “prime contracts.” and adding “prime contracts unless stated otherwise in the contract.” in its place;

- e. Revising the introductory text of Alternate I and II, respectively; and
- f. Adding Alternate III.

The revised and added text reads as follows:

52.219-9 Small Business Subcontracting Plan.

* * * * *

SMALL BUSINESS SUBCONTRACTING
PLAN (JUL 2010)

* * * * *

(d) * * *

(10) * * *

(iii) Submit the Individual Subcontract Report (ISR) and/or the Summary Subcontract Report (SSR), in accordance with paragraph (l) of this clause using the Electronic Subcontracting Reporting System (eSRS) at <http://www.esrs.gov>. The reports shall provide information on subcontract awards to small business concerns (including ANCs and Indian tribes that are not small businesses), veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, small disadvantaged business concerns (including ANCs and Indian tribes that have not been certified by the Small Business Administration as small disadvantaged businesses), women-owned small business concerns, and Historically Black Colleges and Universities and Minority Institutions. Reporting shall be in accordance with this clause, or as provided in agency regulations;

* * * * *

(v) Provide its prime contract number, its DUNS number, and the e-mail address of the offeror's official responsible for acknowledging receipt of or rejecting the ISRs, to all first-tier subcontractors with subcontracting plans so they can enter this information into the eSRS when submitting their ISRs; and

(vi) Require that each subcontractor with a subcontracting plan provide the prime contract number, its own DUNS number, and the e-mail address of the subcontractor's official responsible for acknowledging receipt of or rejecting the ISRs, to its subcontractors with subcontracting plans.

* * * * *

(l) * * * Only subcontracts involving performance in the United States or its outlying areas should be included in these reports with the exception of subcontracts under a contract awarded by the State Department or any other agency that has statutory or regulatory authority to require subcontracting plans for subcontracts performed

outside the United States and its outlying areas.

* * * * *

Alternate I (Oct 2001). As prescribed in 19.708(b)(1)(i), substitute the following paragraph (c) for paragraph (c) of the basic clause:

* * * * *

Alternate II (Oct 2001). As prescribed in 19.708(b)(1)(ii), substitute the following paragraph (c) for paragraph (c) of the basic clause:

* * * * *

Alternate III (JUL 2010). As prescribed in 19.708(b)(1)(iii), substitute the following paragraphs (d)(10) and (l) for paragraphs (d)(10) and (l) in the basic clause;

(d)(10) Assurances that the offeror will—

(i) Cooperate in any studies or surveys as may be required;

(ii) Submit periodic reports so that the Government can determine the extent of compliance by the offeror with the subcontracting plan;

(iii) Submit Standard Form (SF) 294 Subcontracting Report for Individual Contract in accordance with paragraph (l) of this clause. Submit the Summary Subcontract Report (SSR), in accordance with paragraph (l) of this clause using the Electronic Subcontracting Reporting System (eSRS) at <http://www.esrs.gov>. The reports shall provide information on subcontract awards to small business concerns (including ANCs and Indian tribes that are not small businesses), veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, small disadvantaged business concerns (including ANCs and Indian tribes that have not been certified by the Small Business Administration as small disadvantaged businesses), women-owned small business concerns, and Historically Black Colleges and Universities and Minority Institutions. Reporting shall be in accordance with this clause, or as provided in agency regulations; and

(iv) Ensure that its subcontractors with subcontracting plans agree to submit the SF 294 in accordance with paragraph (l) of this clause. Ensure that its subcontractors with subcontracting plans agree to submit the SSR in accordance with paragraph (l) of this clause using the eSRS.

(l) *The Contractor shall submit a SF 294.* The Contractor shall submit SSRs using the web-based eSRS at <http://www.esrs.gov>. Purchases from a corporation, company, or subdivision that is an affiliate of the prime Contractor or subcontractor are not included in these reports. Subcontract

award data reported by prime Contractors and subcontractors shall be limited to awards made to their immediate next-tier subcontractors. Credit cannot be taken for awards made to lower tier subcontractors, unless the Contractor or subcontractor has been designated to receive a small business or small disadvantaged business credit from an ANC or Indian tribe. Only subcontracts involving performance in the U.S. or its outlying areas should be included in these reports with the exception of subcontracts under a contract awarded by the State Department or any other agency that has statutory or regulatory authority to require subcontracting plans for subcontracts performed outside the United States and its outlying areas.

(1) *SF 294.* This report is not required for commercial plans. The report is required for each contract containing an individual subcontract plan. For prime contractors the report shall be submitted to the contracting officer, or as specified elsewhere in this contract. In the case of a subcontract with a subcontracting plan, the report shall be submitted to the entity that awarded the subcontract.

(i) The report shall be submitted semi-annually during contract performance for the periods ending March 31 and September 30. A report is also required for each contract within 30 days of contract completion. Reports are due 30 days after the close of each reporting period, unless otherwise directed by the Contracting Officer. Reports are required when due, regardless of whether there has been any subcontracting activity since the inception of the contract or the previous reporting period.

(ii) When a subcontracting plan contains separate goals for the basic contract and each option, as prescribed by FAR 19.704(c), the dollar goal inserted on this report shall be the sum of the base period through the current option; for example, for a report submitted after the second option is exercised, the dollar goal would be the sum of the goals for the basic contract, the first option, and the second option.

(2) *SSR.* (i) Reports submitted under individual contract plans—

(A) This report encompasses all subcontracting under prime contracts and subcontracts with the awarding agency, regardless of the dollar value of the subcontracts.

(B) The report may be submitted on a corporate, company or subdivision (e.g. plant or division operating as a separate profit center) basis, unless otherwise directed by the agency.

(C) If a prime Contractor and/or subcontractor is performing work for more than one executive agency, a

separate report shall be submitted to each executive agency covering only that agency's contracts, provided at least one of that agency's contracts is over \$550,000 (over \$1,000,000 for construction of a public facility) and contains a subcontracting plan. For DoD, a consolidated report shall be submitted for all contracts awarded by military departments/agencies and/or subcontracts awarded by DoD prime Contractors. However, for construction and related maintenance and repair, a separate report shall be submitted for each DoD component.

(D) For DoD and NASA, the report shall be submitted semi-annually for the six months ending March 31 and the twelve months ending September 30. For civilian agencies, except NASA, it shall be submitted annually for the twelve-month period ending September 30. Reports are due 30 days after the close of each reporting period.

(E) Subcontract awards that are related to work for more than one executive agency shall be appropriately allocated.

(F) The authority to acknowledge or reject SSRs in the eSRS, including SSRs submitted by subcontractors with subcontracting plans, resides with the Government agency awarding the prime contracts unless stated otherwise in the contract.

(ii) Reports submitted under a commercial plan—

(A) The report shall include all subcontract awards under the commercial plan in effect during the Government's fiscal year.

(B) The report shall be submitted annually, within thirty days after the end of the Government's fiscal year.

(C) If a Contractor has a commercial plan and is performing work for more than one executive agency, the Contractor shall specify the percentage of dollars attributable to each agency from which contracts for commercial items were received.

(D) The authority to acknowledge or reject SSRs for commercial plans resides with the Contracting Officer who approved the commercial plan.

(iii) All reports submitted at the close of each fiscal year (both individual and commercial plans) shall include a Year-End Supplementary Report for Small Disadvantaged Businesses. The report shall include subcontract awards, in whole dollars, to small disadvantaged business concerns by North American Industry Classification System (NAICS) Industry Subsector. If the data are not available when the year-end SSR is submitted, the prime Contractor and/or subcontractor shall submit the Year-End Supplementary Report for Small Disadvantaged Businesses within 90 days of submitting the year-end SSR. For a commercial plan, the Contractor may obtain from each of its subcontractors a predominant NAICS

Industry Subsector and report all awards to that subcontractor under its predominant NAICS Industry Subsector.

PART 53—FORMS

■ 8. Revise section 53.219 to read as follows:

53.219 Small Business Programs.

(a) The following form may be used in reporting small disadvantaged business contracting data: OF 312 (10/00), Small Disadvantaged Business Participation Report. (See subpart 19.12.)

(b) The following standard form is prescribed for use in reporting small business (including Alaska Native Corporations and Indian tribes), veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business (including Alaska Native Corporations and Indian tribes) and women-owned small business subcontracting data, as specified in part 19: SF 294, (Rev. 1/2010) Subcontracting Report for Individual Contracts. SF 294 is authorized for local reproduction.

■ 9. Add section 53.301–294 to read as follows:

53.301–294 Subcontracting Report for Individual Contracts.

BILLING CODE 6820–EP–S

SUBCONTRACTING REPORT FOR INDIVIDUAL CONTRACTS (See instructions on reverse)

OMB No: 9000-0006
Expires: 11/30/2010

Public reporting burden for this collection of information is estimated to average 55.34 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Acquisition Policy Division, Regulatory Secretariat, GSA, Washington, DC 20405.

1. CORPORATION, COMPANY, OR SUBDIVISION COVERED			3. DATE SUBMITTED	
a. COMPANY NAME			4. REPORTING PERIOD FROM INCEPTION OF CONTRACT THRU: <input type="checkbox"/> MAR 31 <input type="checkbox"/> SEPT 30 YEAR	
b. STREET ADDRESS				
c. CITY	d. STATE	e. ZIP CODE		
2. CONTRACTOR IDENTIFICATION NUMBER			5. TYPE OF REPORT <input type="checkbox"/> REGULAR <input type="checkbox"/> FINAL <input type="checkbox"/> REVISED	
6. ADMINISTERING ACTIVITY (Please check applicable box)				
<input type="checkbox"/> ARMY <input type="checkbox"/> GSA <input type="checkbox"/> NASA <input type="checkbox"/> NAVY <input type="checkbox"/> DOE <input type="checkbox"/> OTHER FEDERAL AGENCY (Specify) <input type="checkbox"/> AIR FORCE <input type="checkbox"/> DEFENSE CONTRACT MANAGEMENT AGENCY				
7. REPORT SUBMITTED AS (Check one and provide appropriate number)			8. AGENCY OR CONTRACTOR AWARDED CONTRACT	
<input type="checkbox"/> PRIME CONTRACTOR			a. AGENCY'S OR CONTRACTOR'S NAME	
<input type="checkbox"/> SUBCONTRACTOR			b. STREET ADDRESS	
9. DOLLARS AND PERCENTAGES IN THE FOLLOWING BLOCKS: <input type="checkbox"/> DO INCLUDE INDIRECT COSTS <input type="checkbox"/> DO NOT INCLUDE INDIRECT COSTS			c. CITY d. STATE e. ZIP CODE	

SUBCONTRACT AWARDS

TYPE	CURRENT GOAL		ACTUAL CUMULATIVE	
	WHOLE DOLLARS	PERCENT	WHOLE DOLLARS	PERCENT
10a. SMALL BUSINESS CONCERNS (Dollar Amount and Percent of 10c.) (SEE SPECIFIC INSTRUCTIONS)				
10b. LARGE BUSINESS CONCERNS (Dollar Amount and Percent of 10c.) (SEE SPECIFIC INSTRUCTIONS)				
10c. TOTAL (Sum of 10a and 10b.)		100.0%		100.0%
11. SMALL DISADVANTAGED BUSINESS (SDB) CONCERNS (Dollar Amount and Percent of 10c.) (SEE SPECIFIC INSTRUCTIONS)				
12. WOMEN-OWNED SMALL BUSINESS (WOSB) CONCERNS (Dollar Amount and Percent of 10c.) (SEE SPECIFIC INSTRUCTIONS)				
13. HISTORICALLY BLACK COLLEGES AND UNIVERSITIES (HBCU) AND MINORITY INSTITUTIONS (MI) (If applicable) (Dollar Amount and Percent of 10c.) (SEE SPECIFIC INSTRUCTIONS)				
14. HUBZone SMALL BUSINESS (HUBZone SB) CONCERNS (Dollar Amount and Percent of 10c.) (SEE SPECIFIC INSTRUCTIONS)				
15. VETERAN-OWNED SMALL BUSINESS CONCERNS (Dollar Amount and Percent of 10c.) (SEE SPECIFIC INSTRUCTIONS)				
16. SERVICE-DISABLED VETERAN-OWNED SMALL BUSINESS CONCERNS (Dollar Amount and Percent of 10c.) (SEE SPECIFIC INSTRUCTIONS)				
17. ALASKA NATIVE CORPORATIONS (ANCs) AND INDIAN TRIBES THAT HAVE NOT BEEN CERTIFIED BY THE SMALL BUSINESS ADMINISTRATION AS SMALL DISADVANTAGED BUSINESSES (Dollar Amount) (SEE SPECIFIC INSTRUCTIONS)				
18. ALASKA NATIVE CORPORATIONS (ANCs) AND INDIAN TRIBES THAT ARE NOT SMALL BUSINESSES (Dollar Amount) (SEE SPECIFIC INSTRUCTIONS)				

Previous Edition is Not Usable

STANDARD FORM 294 (REV. 6/2010)
Prescribed by GSA-FAR (48 CFR 53.219(a))

19. REMARKS

20a. NAME OF INDIVIDUAL ADMINISTERING SUBCONTRACTING PLAN

20b. TELEPHONE NUMBER

AREA CODE	NUMBER
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GENERAL INSTRUCTIONS

1. This report is not required for small businesses.
2. This report is not required for commercial items for which a commercial plan has been approved, nor from large businesses in the Department of Defense (DOD) Test Program for Negotiation of Comprehensive Subcontracting plans. The Summary Subcontract Report (SSR) is required for contractors operating under one of these two conditions and should be submitted to the Government in accordance with the instructions on that form.
3. This form collects subcontract award data from prime contractors/subcontractors that : (a) hold one or more contracts over \$550,000 (over \$1,000,000 for construction of a public facility); and (b) are required to report subcontracts awarded to Small Business (SB), Small Disadvantaged Business (SDB), Women-Owned Small Business (WOSB), HUBZone Small Business (HUBZone SB), Veteran-Owned Small Business (VOSB) and Service-Disabled Veteran-Owned Small Business concerns under a subcontracting plan. For the Department of Defense (DOD), the National Aeronautics and Space Administration (NASA), and the Coast Guard, this form also collects subcontract award data for Historically Black Colleges and Universities (HBCUs) and Minority Institutions (MIs).
4. This report is required for each contract containing a subcontracting plan and must be submitted to the administrative contracting officer (ACO) or contracting officer if no ACO is assigned, semi-annually, during contract performance for the periods ended March 31st and September 30th. A separate report is required for each contract at contract completion. Reports are due 30 days after the close of each reporting period unless otherwise directed by the contracting officer. Reports are required when due, regardless of whether there has been any subcontracting activity since the inception of the contract or since the previous report.
5. Only subcontracts involving performance in the United States or its outlying areas should be included in this report with the exception of subcontracts under a contract awarded by the State Department or any other agency that has statutory or regulatory authority to require subcontracting plans for subcontracts performed outside the United States and its outlying areas.
6. Purchases from a corporation, company, or subdivision that is an affiliate of the prime/subcontractor are not included in this report.
7. Subcontract award data reported on this form by prime contractors/subcontractors shall be limited to awards made to their immediate subcontractors. Credit cannot be taken for awards made to lower tier subcontractors unless you have been designated to receive an SB and SDB credit from an Alaska Native Corporation (ANC) or Indian tribe.
8. FAR 19.703 sets forth the eligibility requirements for participating in the subcontracting program.
9. Actual achievements must be reported on the same basis as the goals set forth in the contract. For example, if goals in the plan do not include indirect and overhead items, the achievements shown on this report should not include them either.

SPECIFIC INSTRUCTIONS

BLOCK 2: For the Contractor Identification Number, enter the nine-digit Data Universal Numbering System (DUNS) number that identifies the specific contractor establishment. If there is no DUNS number available that identifies the exact name and address entered in Block 1, contact Dun and Bradstreet Information Services at 1-866-705-5711 or via the Internet at <http://www.dnb.com>. The contractor should be prepared to provide the following information: (i) Company legal business name. (ii) Tradestyle, doing business, or other name by which your entity is commonly recognized. (iii) Company physical street address, city, state and ZIP Code. (iv) Company mailing address, city, state and ZIP Code (if separate from physical). (v) Company telephone number. (vi) Date the company was started. (vii) Number of employees at your location. (viii) Chief executive officer/key manager. (ix) Line of business (industry). (x) Company Headquarters name and address (reporting relationship within your entity).

BLOCK 4: Check only one. Note that all subcontract award data reported on this form represents activity since the inception of the contract through the date indicated on this block.

BLOCK 5: Check whether this report is a "Regular," "Final," and/or "Revised" report. A "Final" report should be checked only if the contractor has completed the contract or subcontract reported in Block 7. A "Revised" report is a change to a report previously submitted for the same period.

BLOCK 6: Identify the department or agency administering the majority of subcontracting plans.

BLOCK 7: Indicate whether the reporting contractor is submitting this report as a prime contractor or subcontractor and the prime contract or subcontract number.

BLOCK 8: Enter the name and address of the Federal department or agency awarding the contract or the prime contractor awarding the subcontract.

BLOCK 9: Check the appropriate block to indicate whether indirect costs are included in the dollar amounts in blocks 10a through 16. To ensure comparability between the goal and actual columns, the contractor may include indirect costs in the actual column only if the subcontracting plan included indirect costs in the goal.

BLOCKS 10a through 18: Under "Current Goal," enter the dollar and percent goals in each category (SB, SDB, WOSB, VOSB, service-disabled VOSB, and HUBZone SB) from the subcontracting plan approved for this contract. (If the original goals agreed upon at contract award have been revised as a result of contract modifications, enter the original goals in Block 19. The amounts entered in Blocks 10a through 16 should reflect the revised goals.) There are no goals for Blocks 17 and 18. Under "Actual Cumulative," enter actual subcontract achievements (dollars and percent) from the inception of the contract through the date of the report shown in Block 4. In cases where indirect costs are included, the amounts should include both direct awards and an appropriate prorated portion of indirect awards. However, the dollar amounts reported under "Actual Cumulative" must be for the same period of time as the dollar amounts shown under "Current Goal." For a contract with options, the current goal should represent the aggregate goal since the inception of the contract. For example, if the contractor is submitting the report during Option 2 of a multiple year contract, the current goal would be the cumulative goal for the base period plus the goal for Option 1 and the goal for Option 2.

BLOCK 10a: Report all subcontracts awarded to SBs including subcontracts to SDBs, WOSB, VOSB, service-disabled VOSB, and HUBZone SBs. For DOD, NASA, and Coast Guard contracts, include subcontracting awards to HBCUs and MIs. Include subcontracts awarded to ANCs and Indian tribe: that are not small businesses and that are not certified by the SBA as SDBs where you have been designated to receive their SB and SDB credit. Where your company and other companies have been designated by an ANC or Indian tribe to receive SB and SDB credit for a subcontract awarded to the ANC or Indian tribe, report only the portion of the total amount of the subcontract that has been designated to your company.

BLOCK 10b: Report all subcontracts awarded to large businesses (LBs) and any other-than-small businesses. Do not include subcontracts awarded to ANCs and Indian tribes that have been reported in 10a above.

BLOCK 10c: Report on this line the total of all subcontracts awarded under this contract (the sum of lines 10a and 10b).

BLOCKS 11 - 16: Each of these items is a subcategory of Block 10a. Note that in some cases the same dollars may be reported in more than one block (e.g., SDBs owned by women or veterans).

BLOCK 11: Report all subcontracts awarded to SDBs (including WOSB, VOSB, service-disabled VOSBs, and HUBZone SB SDBs). Include subcontracts awarded to ANCs and Indian tribes that have not been certified by SBA as SDBs where you have been designated to receive their SDB credit. Where your company and other companies have been designated by an ANC or Indian tribe to receive their SDB credit for a subcontract awarded to the ANC or Indian tribe, report only the portion of the total amount of the subcontract that has been designated to your company. For DoD, NASA, and Coast Guard contracts, include subcontracting awards to HBCUs and MIs.

BLOCK 12: Report all subcontracts awarded to WOSBs (including SDBs, VOSBs (including service-disabled VOSBs), and HUBZone SBs that are also WOSBs).

BLOCK 13: (For contracts with DoD, NASA, and Coast Guard): Report all subcontracts with HBCUs/MIs. Complete the column under "Current Goal" only when the subcontracting plan establishes a goal.

BLOCK 14: Report all subcontracts awarded to HUBZone SBs (including WOSBs, VOSBs (including service-disabled VOSBs), and SDBs that are also HUBZone SBs).

BLOCK 15: Report all subcontracts awarded to VOSBs including service-disabled VOSBs (and including SDBs, WOSBs, and HUBZone SBs that are also VOSBs).

BLOCK 16: Report all subcontracts awarded to service-disabled VOSBs (including SDBs, WOSBs, and HUBZone SBs that are also service-disabled VOSBs).

BLOCK 17: Report all subcontracts awarded to ANCs and Indian tribes that are reported in Block 11, but have not been certified by SBA as SDBs.

BLOCK 18: Report all subcontracts awarded to ANCs and Indian tribes that are reported in Block 10a, but are not small businesses.

BLOCK 19: Enter a short narrative explanation if (a) SB, SDB, WOSB, VOSB, service-disabled VOSB, or HUBZone SB accomplishments fall below that which would be expected using a straight-line projection of goals through the period of contract performance; or (b) if this is a final report, any one of the six goals were not met.

DEFINITIONS

1. Direct Subcontract Awards are those that are identified with the performance of one or more specific Government contract(s).

2. Indirect costs are those which, because of incurrence for common or joint purposes, are not identified with specific Government contracts; these awards are related to Government contract performance but remain for allocation after direct awards have been determined and identified to specific Government contracts.

DISTRIBUTION OF THIS REPORT

For the Awarding Agency or Contractor:

The original copy of this report should be provided to the contracting officer at the agency or contractor identified in Block 8. For contracts with DOD, a copy should also be provided to the Defense Contract Management Agency (DCMA) at the cognizant Defense Contract Management Area Operations (DCMAO) office.

For the Small Business Administration (SBA):

A copy of this report must be provided to the cognizant Commercial Market Representative (CMR) at the time of a compliance review. It is NOT necessary to mail the SF 294 to SBA unless specifically requested by the CMR.

[FR Doc. 2010-14180 Filed 6-15-10; 8:45 am]

BILLING CODE 6820-EP-C

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 4, 5, 8, 13, and 16****[FAC 2005-42; FAR Case 2009-010; Item
III; Docket 2009-0010, Sequence 1]****RIN 9000-AL24****Federal Acquisition Regulation; FAR
Case 2009-010, American Recovery
and Reinvestment Act of 2009 (the
Recovery Act)—Publicizing Contract
Actions****AGENCIES:** Department of Defense (DoD),
General Services Administration (GSA),
and National Aeronautics and Space
Administration (NASA).**ACTION:** Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have adopted as final, with minor changes, an interim rule amending the Federal Acquisition Regulation (FAR) to implement the Office of Management and Budget (OMB) Memorandum M-09-10, entitled "Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009," (the Recovery Act) with respect to publicizing contract actions. The OMB issued Memorandum M-09-15, entitled "Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009," to supplement, amend, and clarify the initial guidance in OMB Memorandum M-09-10.

DATES: *Effective Date:* July 16, 2010.

Applicability Date: This rule applies on or after the effective date of this rule to: (1) solicitations issued, (2) contracts awarded, (3) orders issued under task and delivery order contracts, and (4) modifications to orders issued under task and delivery order contracts.

FOR FURTHER INFORMATION CONTACT: Michael Jackson, Procurement Analyst, at (202) 208-4949, for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755. Please cite FAC 2005-42, FAR Case 2009-010.

SUPPLEMENTARY INFORMATION:**A. Background**

On February 17, 2009, the President signed the Recovery Act. On February 18, 2009, the Director of the Office of Management and Budget (OMB) issued initial implementing guidance, OMB Memorandum M-09-10. One of the provisions of the initial OMB guidance was to provide accountability and transparency relative to publicizing contract actions. The OMB guidance required that the FAR be amended to reflect—

1. Unique requirements for posting of presolicitation notices;
2. Unique requirements for announcing contract awards;
3. Unique requirements for entering awards into the Federal Procurement Data System (FPDS); and
4. Unique requirements for actions that are not fixed-price or competitive.

The OMB Memorandum M-09-15, dated April 3, 2009, entitled "Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009," supplements, amends, and clarifies the initial guidance issued on February 18, 2009. All significant updates to OMB Memorandum M-09-10 are outlined in section 1.5 of M-09-15. These updates are based on ongoing input received from the public, Congress, State and local government officials, grant and contract recipients, and Federal personnel.

The interim rule was published in the **Federal Register** at 74 FR 14636 on March 31, 2009, with a request for comments by June 1, 2009.

The interim rule implemented section 6.2 of the OMB Memorandum M-09-10. In addition, the interim rule enabled the Governmentwide Point of Entry (GPE) (<https://www.fedbizopps.gov>) to be leveraged for the purpose of fulfilling the requirements of sections 1526(c)(4) and 1554 of Division A of the Recovery Act.

Three respondents submitted seven comments in response to the interim rule.

B. Responses to Public Comments

Below are the comments received on the interim rule, along with the responses developed by the Councils.

1. *Comment:* In publicizing postaward notices, the Councils should require that contracting officers publicize the text of the entire contract awarded. A narrative description of the award only would hinder transparency since a summary would omit many key details that are essential benchmarks by which to measure the quality and effectiveness of Government contractors. Without this information, the public, Government

watchdogs, and the news media would have a difficult time identifying waste, fraud, and abuse and excellent contract work, as well. While the Recovery Act specifies that a description of contracts be posted online, the FAR should be amended in order to realize the intent of the Act.

Response: The public may obtain copies of contracts using the Freedom of Information Act (FOIA) process in accordance with FAR subpart 24.2. The costs associated with redacting every Recovery Act contract action to guard against improper disclosure of proprietary, business confidential, or national security information would be prohibitive.

2. *Comment:* The case would have contracting officers "post preaward notices for orders exceeding \$25,000 for 'informational purposes' only". On its face, this seems to apply to task and delivery orders placed competitively against multiple-award contract vehicles, such as indefinite-delivery-indefinite-quantity (IDIQ) contracts. Given that the regulations appear to be designed for non-FFP and/or non-competitive actions, can we confirm its justification and application to competitively awarded IDIQ orders?

Response: The requirement to post presolicitation and award notices on FedBizOpps GPE applies to all orders with a dollar value exceeding \$25,000 regardless of competition procedures or pricing arrangements used, including those orders placed under Federal Supply Schedules, Governmentwide acquisition contracts, multiple-agency contracts, blanket purchase agreements, basic ordering agreements, and indefinite delivery type contracts. Additionally, if noncompetitive procedures or non-fixed-price arrangements were used for award of the order, then the contracting officer must provide the rationale required by FAR 5.705(b) in the award notice.

3. *Comment:* The case mandates that FedBizOpps notices "describe supplies and services in a narrative that is clear and unambiguous to the general public." The phrase, "clear and unambiguous to the general public" is itself ambiguous. Will there be supplemental guidance or definitions to avoid inevitable protests based on subjective interpretations of requirements descriptions? Suggest replacing the term "clear and unambiguous to the general public" with specific content elements required to satisfy the goals of providing appropriate information.

Response: The phrase "clear and unambiguous to the general public" is being replaced with "clear and concise language" to alleviate some confusion

associated with the word “unambiguous.” This word is subject to interpretation by the reader. However, care must be taken not to tie the hands of the contracting officer with an overly restrictive description of the requirement that would result in limiting competition. The OMB Memorandum M–09–15 also advises that agencies should ensure that descriptions of procurements use language appropriate for a more general audience, avoiding industry-specific terms and acronyms without plain language explanations. This concept has been added to the FAR.

4. *Comment:* The case requires contracting officers to enter data in the Federal Procurement Data System on any action funded in whole or in part by the American Recovery and Reinvestment Act (ARRA) funds. However, there is a disconnect between reporting in FedBizOpps and FPDS–Next Generation (NG) since FPDS–NG Contract Action Reports do not have a field for appropriation. A field for appropriation (e.g., ARRA funds) needs to be added to FPDS–NG. Otherwise, research in two separate systems is required to determine if an award is actually using ARRA funds.

Response: Instructions for how to enter the Treasury Account Symbol (TAS) for the Recovery Act actions in FPDS are posted at the FPDS website and have been provided to every Federal agency through the OMB guidance. The TAS is being collected for the Recovery Act–funded awards. The full appropriation is not required by the statute or OMB guidance. The GSA is working on usability enhancements to FedBizOpps to allow for easier comparisons between the two systems.

5. *Comment:* In the instructions regarding the applicability date, recommend adding modifications to this sentence as follows: “This rule applies on or after the effective date of this rule to (1) solicitations issued, (2) contracts awarded, (3) orders issued under existing task and delivery order contracts, and (4) any monetary modifications as defined in the rule.”

Response: The Councils have expanded the instructions regarding the applicability date to add a fourth action to include: “modifications to orders issued under task and delivery order contracts.” This addition will address modifications that are subject to the Recovery Act postaward reporting. Modifications to orders issued under new contracts are covered by paragraph (2) “contracts awarded.”

6. *Comment:* Recommend revising FAR 5.704(a)(2) to clearly indicate that modifications to task and delivery

orders of \$25,000 or more also require publication in FedBizOpps. This could be achieved by revising FAR 5.704(a)(2) to read as follows: “In addition, notices of proposed contract actions are required for orders and modifications of orders of \$25,000 or more, funded in whole or in part by the Recovery Act, which are issued under task or delivery orders.”

Response: The Councils have not expanded the FAR to include posting preaward notices of modifications to orders; the FAR continues to cover modifications at the postaward notice stage.

7. *Comment:* This new rule is silent on FAR section 5.205, Special situations. There is no discussion on posting special notices on R&D, A&E, OMB Circular A–76, and 8(a). Guidance is needed in this area considering that a portion of ARRA funding should be awarded to American Indians, which comprise the largest percentage of 8(a) firms.

Response: Guidance is not necessary on this issue.

C. Changes to the FAR

The final rule makes the following amendments:

- FAR 5.704(a)(2) to clarify that modifications of orders are not required to be publicized at the preaward stage.
- FAR 5.704(b) to require contracting officers to identify proposed contract actions, funded in whole or in part by the Recovery Act, by using the instructions that are at FAR 5.704(b) and available in the Recovery FAQs at the GPE <https://www.fedbizopps.gov>.
- FAR 5.704(c) and 5.705(a) to ensure that the description required by FAR 5.207(a)(16) clearly defines the elements of the requirement to the general public.
- FAR 5.705(b) to require contracting officers to include in the description of the contract action a statement specifically noting if the action was not awarded competitively, or was not fixed–price, or was neither competitive nor fixed–price.

This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

D. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility

Act, 5 U.S.C. 601, *et seq.*, because the OMB guidance affects only internal Government operations and provides a strong preference for using small businesses for Recovery Act programs wherever possible. The final rule does not impose any additional requirements on small businesses.

E. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. chapter 35, *et seq.*

List of Subjects in 48 CFR Parts 4, 5, 8, 13, and 16

Government procurement.

Dated: June 2, 2010.

Edward Loeb,

Acting Director, Acquisition Policy Division.

■ Accordingly, the interim rule published in the **Federal Register** at 74 FR 14636 on March 31, 2009, is adopted as a final rule with the following changes:

PART 5—PUBLICIZING CONTRACT ACTIONS

■ 1. The authority citation for 48 CFR part 5 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

■ 2. Amend section 5.704 by revising the section heading, paragraphs (a)(2), (b), and (c) to read as follows:

5.704 Publicizing preaward.

(a) * * *

(2) In addition, notices of proposed contract actions are required for orders exceeding \$25,000, funded in whole or in part by the Recovery Act, which are issued under task or delivery order contracts. This does not include modifications to existing orders, but these modifications are covered postaward, see 5.705. These notices are for “informational purposes only,” therefore, 5.203 does not apply. Contracting officers should concurrently use their usual solicitation practice (e.g., e–Buy).

(b) Contracting officers shall identify proposed contract actions, funded in whole or in part by the Recovery Act, by using the following instructions which are also available in the Recovery FAQs under “Buyers/Engineers” at the Governmentwide Point of Entry (GPE) (<https://www.fedbizopps.gov>):

(1) If submitting notices electronically via ftp or email, enter the word “Recovery” as the first word in the title field.

(2) If using the GPE directly, select the “yes” radio button for the “Is this a Recovery and Reinvestment Act action” field on the “Notice Details” form (Step 2) located below the “NAICS Code” field. In addition, enter the word “Recovery” as the first word in the title field.

(c) In preparing the description required by 5.207(a)(16), use clear and concise language to describe the planned procurement. Use descriptions of the goods and services (including construction), that can be understood by the general public. Avoid the use of acronyms or terminology that is not widely understood by the general public.

■ 3. Amend section 5.705 by revising the section heading, paragraph (a), the introductory text of paragraph (b), and paragraph (c) to read as follows:

5.705 Publicizing postaward.

* * * * *

(a)(1) Publicize the award notice for any action exceeding \$500,000, funded in whole or in part by the Recovery Act, including—

- (i) Contracts;
- (ii) Modifications to existing contracts;
- (iii) Orders which are issued under task or delivery order contracts; and
- (iv) Modifications to orders under task or delivery order contracts.

(2) Contracting officers shall identify contract actions, funded in whole or in part by the Recovery Act, by using the following instructions which are also available in the Recovery FAQs under “Buyers/Engineers” at the Governmentwide Point of Entry (GPE) (<https://www.fedbizopps.gov>):

(i) If submitting notices electronically via ftp or email, enter the word “Recovery” as the first word in the title field.

(ii) If using the GPE directly, select the “yes” radio button for the “Is this a Recovery and Reinvestment Act action” field on the “Notice Details” form (Step 2) located below the “NAICS Code” field. In addition, enter the word “Recovery” as the first word in the title field.

(3) In preparing the description required by 5.207(a)(16), use clear and concise language to describe the planned procurement. Use descriptions of the goods and services (including construction), that can be understood by the general public. Avoid the use of acronyms or terminology that is not widely understood by the general public.

(b) Regardless of dollar value, if the contract action, including all modifications and orders under task or

delivery order contracts, is not both fixed-price and competitively awarded, publicize the award notice and include in the description the rationale for using other than a fixed-priced and/or competitive approach. Include in the description a statement specifically noting if the contract action was not awarded competitively, or was not fixed-price, or was neither competitive nor fixed-price. These notices and the rationale will be available to the public at the GPE, so do not include any proprietary information or information that would compromise national security. The following table provides examples for when a rationale is required.

* * * * *

(c) Contracting officers shall use the instructions available in the Recovery FAQs under “Buyers/Engineers” at the GPE (<https://www.fedbizopps.gov>) to identify actions funded in whole or in part by the Recovery Act.

[FR Doc. 2010-14220 Filed 6-15-10; 8:45 am]

BILLING CODE 6820-EP-S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 5, 6, 13, and 24

[FAC 2005-42; FAR Case 2008-003 Item IV; Docket 2008-0001, Sequence 27]

RIN 9000-AL13

Federal Acquisition Regulation; FAR Case 2008-003, Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts—Section 844 of the National Defense Authorization Act for Fiscal Year 2008

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have adopted as final, with changes, an interim rule amending the Federal Acquisition Regulation (FAR) to implement the National Defense Authorization Act for Fiscal Year 2008, Section 844 “Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts” (FY08 NDAA). Section 844 of the FY08 NDAA stipulates the requirements regarding

the public availability of justifications and approval documents after the award of Federal contracts, except for information exempt from public disclosure.

DATES: *Effective Date:* July 16, 2010.

FOR FURTHER INFORMATION CONTACT:

Ernest Woodson, Procurement Analyst, at (202) 501-3775, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-42, FAR Case 2008-003.

SUPPLEMENTARY INFORMATION:

A. Background

The National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, Section 844, entitled “Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts,” amends 10 U.S.C. 2304 and 41 U.S.C. 253 regarding procurements made under subsection (c) (*i.e.*, other than competitive procedures) to require public availability of the justification and approval (J&A) documents after contract award, except for information exempt from public disclosure under 5 U.S.C. 552. The provisions of section 844 require the head of an executive agency to make certain J&A documents relating to the use of noncompetitive procedures in contracting available on the website of an agency and through a governmentwide website selected by the Administrator for Federal Procurement Policy (OFPP) within 14 days of contract award. In the case of noncompetitive contracts awarded on the basis of unusual and compelling urgency, the documents must be posted within 30 days of contract award. The Competition in Contracting Act (Pub. L. 98-369) already requires that such J&A documents be made available for public inspection, subject to the exemptions from public disclosure provided in the Freedom of Information Act (FOIA) (5 U.S.C. 552).

The interim rule was published in the **Federal Register** at 74 FR 2731 on January 15, 2009, with an effective date of February 17, 2009, and a request for comments by March 16, 2009.

Nine respondents submitted nineteen comments in response to the interim rule. There were six categories of comments. These categories were applicability, exceptions, Federal Business Opportunities (FedBizOpps), protests, FOIA, and veterans.

Below are the comments received on the interim rule along with the responses developed by the Councils.

Applicability:

1. *Comment:* The rule states that the posting requirement applies to all contracts awarded under FAR 6.303–1 J&A documents. Is the intent to include sole-source justifications prepared under FAR subpart 13.5?

Response: Section 844 of the FY08 NDAA requires posting of documents containing the J&A required by subsection (f)(1) of 10 U.S.C. 2304 or 41 U.S.C. 253. Subsection (g) of those statutes provides for streamlined procedures that promote efficiency and economy in contracting and avoid unnecessary burdens for agencies and contractors for purchases not greater than the simplified acquisition threshold and for purchases made pursuant to the commercial-items test program. Accordingly, FAR 6.001 states that part 6 does not apply to acquisitions for contracts awarded using the simplified acquisition procedures and adds a reference to FAR 13.501 for the requirements pertaining to sole-source acquisitions of commercial items over the simplified acquisition threshold under subpart 13.5. FAR 13.501 implemented 10 U.S.C. 4052(g), which stipulates that an executive agency may not conduct a purchase on a sole-source basis unless the need to do so is justified in writing and approved in accordance with 10 U.S.C. 2304 or 41 U.S.C. 253. Thus, 10 U.S.C. 4052(g) imposed a justification process on sole-source actions over the simplified acquisition threshold done under the commercial-items test program. Similarly, though section 844 does not require posting of the FAR 13.501 J&As document, the Councils recommend, as a matter of policy, that J&As required by FAR 13.501 also be posted on FedBizOpps. Such posting is consistent with the President's focus on creating a "New Era of Open Government" and is reasonable because these actions exceed the simplified acquisition threshold and posting could enhance opportunities for competition on future requirements of such commercial items. It is also consistent with the existing requirement (FAR 5.102(a)(6)) to post a brand name justification in FedBizOpps along with the solicitation. Therefore, the rule has been revised to include the requirement to post FAR 13.501 justifications.

2. *Comment:* The rule states that the posting requirement applies to all contracts awarded under FAR 6.303–1 J&A document. Is the intent to include limited-source justifications for orders placed under Federal Supply Schedules in accordance with FAR 8.405–6?

Response: The posting requirement of Section 844 of the FY08 NDAA pertains

to J&As executed pursuant to FAR subpart 6.3, it does not apply to the placement of orders under the Federal Supply Schedules. However, a separate FAR Case will implement section 843 of the NDAA, which requires posting of sole source task or delivery orders in excess of the Simplified Acquisition Threshold that are placed against multiple award contracts.

Exceptions:

3. *Comment:* Will there be a dollar threshold for when we need to post the J&A to the FedBizOpps website?

Response: There is no dollar threshold that triggers the requirement to post the J&A.

4. *Comment:* If a purchase meets an exception at FAR 5.202 does it need to be posted? Recommend making exceptions to posting J&A consistent with the FAR exceptions to posting synopses (FAR 5.202), solicitation (FAR 5.102(a)(5)), or contract awards (FAR 5.301(b)).

Response: The exceptions provided at FAR 5.102, 5.202, and 5.301 all derive from section 18 of the Office of Federal Procurement Policy (OFPP) Act. The requirement to make the J&A available for public inspection is not a new requirement, but previously implemented 10 U.S.C. 2304(f)(4) and 41 U.S.C. 253(f)(4). Only the requirement to post the J&A is new. Section 844 of the FY08 NDAA requires posting of the J&A and provides for exclusion of information exempt from public disclosure under section 552 of Title 5 U.S.C. (FOIA). As such, the FAR exceptions cannot automatically be applied to the posting of J&A. The Councils revised FAR 6.305 to add a new paragraph (e) to recognize that, in addition to redacting information in the J&A consistent with FOIA exemptions, there may also be cases where the J&A itself would be exempted from being posted per the FOIA exemptions. One such instance is when posting the J&A would disclose the executive agency's needs and disclosure would compromise national security or create other security risks. The Councils added this specific exception to the FAR because it is clearly consistent with FOIA and FAR 5.102, 5.202, and 5.301. Any other FOIA exemption that might authorize not posting the J&A must be determined in accordance with FAR subpart 24.2.

5. *Comment:* Under FAR 5.202(a), there are several items that would prevent the agency from posting information available on the web for a pre-solicitation announcement. Currently, there is no such exception to posting the J&A, which can lead to a

situation where the J&A gets posted while the award does not. When this happens, FedBizOpps rejects posting the J&A because it can't find the related award. FedBizOpps also rejects the J&A when a previously posted award has been placed in archive status.

Response: The Councils have confirmed that FedBizOpps allows for the posting of a J&A even if there was no prior synopsis.

6. *Comment:* A major concern for members of the intelligence community regards the potential security threat from publication of even unclassified material. Publicizing systems designed with the broader community in mind cannot always protect the sensitive but unclassified nature of the intelligence business. If this new requirement cannot be deleted in whole, then they request an exemption to the public disclosure requirement for the Office of the Director of National Intelligence until an ancillary classified database is developed for the intelligence community and others with sensitive information.

Response: The contracting officer already has the authority to determine when not to disclose information that would compromise national security or create other security risks, for example per FOIA exemptions 1 and 7. However, as explained in the response to comment 4, the Councils did revise FAR 6.305 to recognize that, in addition to redacting information in the J&A consistent with FOIA exemptions, there may also be cases where the J&A itself would be exempted from being posted per the FOIA exemptions.

Websites:

7. *Comment:* Is the award number a fill in-the-blank for FedBizOpps? Will the award date be a fill in-the-box? It would be helpful so vendors know that it was already awarded.

Response: When the Government is posting a J&A to FedBizOpps, it has the option of associating the J&A with an existing award notice in the system. In this case, the system will automatically populate the contract award number and award date. Otherwise, the Government will need to manually enter the contract award number and award date into the J&A notice form. (Note: An award number is not required for a brand-name J&A since a brand name J&A must be posted with the solicitation.)

Protests:

8. *Comment:* When a vendor sees a J&A posted, will they have protest rights?

Response: The statute did not change any protest rights, including any timeliness requirements. The rationale for posting is just to make the process more transparent.

9. *Comment:* One commenter recommends the rule should recognize the date publicized on FedBizOpps as the date upon which a basis of protest is known under GAO rules of procedure. Another commenter states that if the protest timeliness rules are revised, there will likely be more protests.

Response: Timeliness requirements have not been revised by the statute. The Councils cannot unilaterally change either the Government Accounting Office (GAO) timeliness rules or Court of Federal Claims statutory jurisdiction. This rule is merely to make the process more transparent and help contractors to be apprised of possible future requirements that in the past were awarded on a sole source basis.

10. *Comment:* The commenter wants to know why the Government is waiting up to 14 days as this will not help protesters compete, and if a protest is lodged, could result in delays and additional cost to the Government.

Response: The intent is not to help protesters compete for the current requirement, but for the future. Section 844 of the FY08 NDAA, which this rule implements, states that the J&A must be made publicly available within 14 days after contract award.

Freedom of Information Act (FOIA):

11. *Comment:* One commenter stated FAR 6.305(c) requires contracting officers to be guided by FOIA exemptions. FOIA procedures address very specific mechanisms and timelines for review and release of information. Referencing FOIA procedures implies that the contracting officer should consult with the sole source contractor prior to release of information. The commenter questions whether such a step could be accomplished within the 14-day to 30-day requirement. Another commenter recommends that contractors be given the right to review J&A documents prior to release to ensure no proprietary information is included in the document, consistent with FOIA.

Response: These commenters are referring to the requirements of Executive Order 12600, that agencies establish procedures to notify submitters of records containing confidential commercial information, the disclosure of which the department or agency has reason to believe could reasonably be expected to cause substantial competitive harm, when

those records are requested under the FOIA.

This executive order applies to the FOIA process that is used to determine financial information that might be exempt from public disclosure. Section 844 of the FY08 NDAA states only that the requirement to post J&As does not require the public availability of information that is exempt from public disclosure under FOIA. It does not mandate the FOIA process.

Additionally, FAR 5.102(a)(6) and 5.705(b) also require posting of J&As for brand name and the rationale for non-competitive awards in support of the Recovery Act, respectively. The FAR requires that these documents be redacted as necessary to preclude disclosure of proprietary information or information that would otherwise compromise national security. In these instances, the FOIA exemptions to public disclosure apply, but not the FOIA process.

Even though the FOIA process and, specifically, the submitter notification process in Executive Order 12600 do not apply, the Councils recognize there is an obligation to ensure that contractor proprietary information is not revealed. To ensure this does not happen, the Councils added language at FAR 6.305(e) that the contracting officer should provide the contractor an opportunity to review, but that this process must not delay posting within the established timelines.

12. *Comment:* Recommend FAR 6.305 be revised to clarify that contracting officers shall remove information from J&As that reveals sensitive or unclassified information such as Operations Security (OPSEC) that could harm the Government if released to the public.

Response: See Council's responses to comments 4 and 6.

13. *Comment:* Recommend removing names, titles, telephone numbers and email addresses of Government employees who develop, review, or approve the J&A, except for publicly known points of contact, such as buyers or contracting officers to protect key Government personnel from harm and to funnel queries from potential offerors to appropriate contracting personnel.

Response: Agencies have the flexibility to establish procedures whereby the actual J&A document includes only the names that the FAR requires for certification (FAR 6.303–2(a)(12) and (b)) and approval (FAR 6.304) purposes.

14. *Comment:* Recommend removing estimated values from the J&As that could reveal the Government's negotiating position on future buys.

Response: FAR 6.305(e) states that “(c)ontracting officers shall also be guided by the exemptions to disclosure of information contained in the Freedom of Information Act...”. Therefore, additional detail on information that is exempt from release, e.g., estimated values, should not be in the FAR. Attempting to provide guidance in the FAR would most likely not list all possibilities, thereby creating the dangerous interpretation that, if it is not listed, it can be released. However, the contracting officer should consult as necessary with the local FOIA office and counsel to determine which information should be exempt from disclosure.

15. *Comment:* Recommend issuing implementing guidance on what to redact to promote consistency in understanding and application.

Response: See Council's response to comment number 14. The FAR is not the governing regulatory document for FOIA. Each agency's implementation of FOIA is located in its respective title of the Code of Federal Regulations. The interim rule amended the FOIA part of the FAR at 24.203(b) to add a reference to the excellent FOIA resources available from the Department of Justice.

16. *Comment:* A commenter asked how long a J&A posted on an agency website must remain available for public inspection.

Response: FedBizOpps requires a 30-day minimum posting requirement, although agencies are not precluded from posting the J&A for a longer period of time. The final rule revises FAR 6.305 to state J&As must remain posted for a minimum of 30 days.

17. *Comment:* The commenter recommends the Councils consider integrating the J&A documents into the database located at www.usaspending.gov.

Response: The law requires posting on the agency website and through a governmentwide website selected by the Administrator for Federal Procurement Policy. The Administrator for Federal Procurement Policy selected FedBizOpps as the governmentwide website.

Veterans:

18. *Comment:* This interim rule is an obstacle to veteran-owned small businesses obtaining Federal business opportunities on a sole source basis, which was the intent of Pub. L. 109–461. Contracting officers will see section 844 as reinforcing their position that soliciting on a competitive basis will provide a fair and reasonable price without having to prepare a J&A.

Response: This interim rule does not alter the criteria that must be satisfied before making a decision that an acquisition will be conducted on a sole-source basis. It also does not alter what documentation must be prepared to support that decision. This interim rule does not impact the authority the Department of Veterans Affairs was given under Pub. L. 109-461 to conduct noncompetitive sourcing under certain conditions or the procedures that the Department of Veterans Affairs puts in place to carry out noncompetitive sourcing. This interim rule merely states that, if a justification for other than full and open competition is issued pursuant to FAR 6.303-1 or 13.501, then that justification must be made publically available on the Government Point of Entry (GPE) website and the agency's website.

19. *Comment:* This interim rule is just another obstacle to the Department of Veterans Affairs determining how to implement Pub. L. 109-461.

Response: The interim rule implementing section 844 of the FY08 NDAA has no direct bearing on the implementation of Pub. L. 109-461.

Changes to the Interim rule. The final rule:

- Adds a new paragraph FAR 6.305(c) to require that, if the justification is a brand-name justification under FAR 6.302-1(c), then it must be posted with the solicitation;

- Requires that the justification remain posted for a minimum of 30 days;

- Adds a new paragraph FAR 6.305(f), to clarify that posting the justification does not apply if it would disclose the executive agency's needs and disclosure of such needs would compromise national security or create other security risks; and

- Establishes procedures at FAR 13.501 similar to procedures at FAR 6.305(b), 6.305(d), 6.305(e), and 6.305(f).

This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule addresses internal Federal agency procedures and will benefit small business entities by providing the

opportunity for the review of J&A documents for contracts awarded noncompetitively, thereby increasing the opportunity for competition for future awards.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. chapter 35, *et seq.*

List of Subjects in 48 CFR Parts 5, 6, 13, and 24

Government procurement.

Dated: June 2, 2010.

Edward Loeb,

Acting Director, Acquisition Policy Division.

■ Accordingly, the interim rule published in the **Federal Register** at 74 FR 2731 on January 15, 2009, is adopted as a final rule with the following changes:

■ 1. The authority citation for 48 CFR parts 6 and 13 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 6—COMPETITION REQUIREMENTS

■ 2. Revise section 6.305 to read as follows:

6.305 Availability of the justification.

(a) The agency shall make publicly available the justification required by 6.303-1 as required by 10 U.S.C. 2304(l) and 41 U.S.C. 253(j). Except for the circumstances in paragraphs (b) and (c) of this section, the justification shall be made publicly available within 14 days after contract award.

(b) In the case of a contract award permitted under 6.302-2, the justification shall be posted within 30 days after contract award.

(c) In the case of a brand name justification under 6.302-1(c), the justification shall be posted with the solicitation (see 5.102(a)(6)).

(d) The justifications shall be made publicly available—

(1) At the Government Point of Entry (GPE) www.fedbizopps.gov;

(2) On the website of the agency, which may provide access to the justifications by linking to the GPE; and

(3) Must remain posted for a minimum of 30 days.

(e) Contracting officers shall carefully screen all justifications for contractor proprietary data and remove all such data, and such references and citations as are necessary to protect the

proprietary data, before making the justifications available for public inspection. Contracting officers shall also be guided by the exemptions to disclosure of information contained in the Freedom of Information Act (5 U.S.C. 552) and the prohibitions against disclosure in 24.202 in determining whether the justification, or portions of it, are exempt from posting. Although the submitter notice process set out in EO 12600, entitled "Predisclosure Notification Procedures for Confidential Commercial Information," does not apply, if the justification appears to contain proprietary data, the contracting officer should provide the contractor that submitted the information an opportunity to review the justification for proprietary data, before making the justification available for public inspection, redacted as necessary. This process must not prevent or delay the posting of the justification in accordance with the timeframes required in paragraphs (a) through (c).

(f) The requirements of paragraphs (a) through (d) do not apply if posting the justification would disclose the executive agency's needs and disclosure of such needs would compromise national security or create other security risks.

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

■ 3. Amend section 13.501 by—

■ a. Removing from paragraph (a)(1)(i) "section; and" and adding "section;" in its place;

■ b. Removing from paragraph (a)(1)(ii) "(41 U.S.C. 428a)." and adding "(41 U.S.C. 428a);" in its place; and

■ c. Adding paragraphs (a)(1)(iii) and (a)(1)(iv) to read as follows:

13.501 Special documentation requirements.

(a) * * *

(1) * * *

(iii) Make publicly available the justifications (excluding brand name) required by 6.305(a) within 14 days after contract award or in the case of unusual and compelling urgency within 30 days after contract award, in accordance with 6.305 procedures at paragraphs (b), (d), (e), and (f); and

(iv) Make publicly available brand name justifications with the solicitation, in accordance with 5.102(a)(6).

[FR Doc. 2010-14216 Filed 6-15-10; 8:45 am]

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DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 10, 44, and 52**

[FAC 2005–42; FAR Case 2008–007; Item V; Docket 2010–0086, Sequence 1]

RIN 9000–AL50

**Federal Acquisition Regulation; FAR
Case 2008–007, Additional
Requirements for Market Research**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement Section 826 of the National Defense Authorization Act for Fiscal Year 2008 (FY08 NDAA). Section 826 established additional requirements in subsection (c) of 10 U.S.C. 2377. As a matter of policy, these requirements are extended to all executive agencies. Specifically, the head of the agency must conduct market research before issuing an indefinite–delivery indefinite–quantity (ID/IQ) task or delivery order for a noncommercial item in excess of the simplified acquisition threshold. In addition, a prime contractor with a contract in excess of \$5 million for the procurement of items other than commercial items is required to conduct market research before making purchases that exceed the simplified acquisition threshold for or on behalf of the Government.

DATES: *Effective Date:* June 16, 2010.

Applicability Date: The rule applies to any solicitations issued and contracts (to include any subcontracts issued under such contracts) awarded on or after the effective date.

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat on or before August 16, 2010 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–42, FAR Case 2008–007, by any of the following methods:

* Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2008–007” under the heading “Enter Keyword or ID” and selecting “Search”. Select the link “Submit a Comment” that corresponds with “FAR Case 2008–007”. Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “FAR Case 2008–007” on your attached document.

* Fax: 202–501–4067.

* Mail: General Services Administration, Regulatory Secretariat (MVCB), 1800 F Street, NW., Room 4041, ATTN: Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005–42, FAR Case 2008–007, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Warren Blankenship, Procurement Analyst, at (202) 501–1900 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–42, FAR Case 2008–007.

SUPPLEMENTARY INFORMATION:**A. Background**

Section 826 of Pub. L. 110–181, the National Defense Authorization Act for Fiscal Year 2008 (FY08 NDAA), amended 10 U.S.C. 2377(c), “Preliminary Market Research”, to require the head of an agency to conduct market research appropriate to the circumstances before awarding a task or delivery order in excess of the simplified acquisition threshold. Head of the agency for purposes of section 826 (10 U.S.C. 2377) is defined in 10 U.S.C. 2376 and means the Secretary of Defense, the Secretary of Homeland Security, and the Administrator of the National Aeronautics and Space Administration. In addition, section 826 requires the head of an agency to take appropriate steps to ensure that any contractor of a contract in an amount in excess of \$5 million for the procurement of items other than commercial items engages in such market research as may be necessary to carry out the requirements of 10 U.S.C. 2377(b)(2) before making purchases for or on behalf of the DoD. The statute also imposes a requirement on the Secretary of Defense to develop training and market research tools to assist contracting officers and contractors in performing appropriate market research.

Two continuous learning modules, CLC 030, “Essentials of Interagency Acquisition/Fair Opportunity,” and CLC 004, “Market Research,” are available at <http://www.dau.mil>; these provide training on the conduct of market research and identify market research tools.

The Councils agree that section 826 should apply in the FAR to all executive agencies, consistent with Governmentwide applications being sought in other competition matters by the Office of Federal Procurement Policy (OFPP). The Councils have determined that the rule will be applicable to solicitations and contracts (to include any subcontracts issued under such contracts) awarded on or after the effective date of this rule.

The requirement for agencies to perform market research is addressed by adding FAR 10.001(a)(2)(v). This change is captured by inserting language to direct the contracting officer to conduct market research before awarding an ID/IQ task or delivery order for noncommercial items in excess of the simplified acquisition threshold. FAR 10.001(a)(2)(vi) is amended to delete the beginning text (“Agencies shall conduct market research”) to bring parallel structure to all the items outlined under FAR 10.001(a)(2). FAR 10.001(d) is added to direct the contracting officer to the requirement in FAR 44.402(a)(2) and FAR clause 52.244–6 (Alternate I) when requiring that a contractor perform market research in contracts in excess of \$5 million for the procurement of items other than commercial items. FAR 10.002(b)(1) is amended to clarify that the contracting officer may use market research conducted within 18 months prior to the award of the ID/IQ contract or the award of any task or delivery order if the information is still current, accurate, and relevant. FAR subpart 44.3 is amended to require the review of market research efforts during Contractors’ Purchasing Systems Reviews to determine that market research is being accomplished. FAR 44.400, Scope of subpart, is revised to reflect the addition of “Section 826 of Public Law 110–181,” which governs the changes to FAR 44.402(a)(2) and FAR clause 52.244–6 (Alternate I). FAR 44.402(a)(2) and FAR clause 52.244–6 (Alternate I) are amended to satisfy 10 U.S.C. 2377(b)(2) as well as to reflect the requirement in 10 U.S.C. 2377(c)(4) that a contractor must perform market research when the contractor is acting as a purchasing agent for the Government with respect to a purchase that exceeds the simplified acquisition threshold under a contract in excess of \$5 million for the procurement of other than

commercial items. FAR 44.403, Contract clause, is revised to renumber the original paragraph as (a) and insert a new paragraph (b) to instruct contracting officers when to use FAR 52.244-6 (Alternate I).

This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Councils do not expect this interim rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the contract dollar threshold for the application of the rule is in excess of \$5 million. The number of small businesses receiving such contract awards is estimated to be statistically insignificant. Based on FY07 and FY08 data in the Federal Procurement Data system (FPDS) for task and delivery orders where the base and all options are over \$5 million, the total number of awards to small businesses in FY07 was 2,024 and in FY08 was 2,399. Additionally, the number of small businesses serving as subcontractors is also very low. Based on FY07 and FY08 data in the FPDS for task or delivery orders where the base and all options fell below \$5 million, the total number of awards to small businesses was 684,658 in FY07 and 697,029 in FY08. Since the FPDS does not track subcontractor data, reasonable estimates of the total figures were established. Therefore, of the total FY07 and FY08 figures, it is estimated that only 20 percent of each will apply to subcontractors. That is representative of 136,932 for FY07 and 139,406 for FY08.

Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

The Councils will also consider comments from small entities concerning the existing regulations in parts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005-42, FAR Case 2008-007) in all correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information

collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. chapter 35, *et seq.*

D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator of the National Aeronautics and Space Administration that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the provisions of section 826 went into effect upon enactment on January 28, 2008. Additionally, it will reduce the number of questionable decisions made due to insufficient market research on contracts in excess of \$5 million dollars and reduce dollars spent unnecessarily due to the lack of market research information obtained, thereby further eliminating violations of the statute. This interim rule is applicable to solicitations issued and contracts (to include any subcontracts issued under such contracts) awarded on or after the effective date of this rule. The Councils believe that the interim rule in the FAR will provide contracting officers and affected prime contractors the relevant regulatory guidance needed when addressing the statutory requirements outlined in this interim rule. However, pursuant to Pub. L. 98-577 and FAR 1.501-3(b), the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 10, 44, and 52

Government procurement.

Dated: June 2, 2010.

Edward Loeb,

Acting Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 10, 44, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 10, 44, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 10—MARKET RESEARCH

■ 2. Amend section 10.001 by—

■ a. Removing from paragraph (a)(2)(iv) “and”

■ b. Redesignating paragraph (a)(2)(v) as paragraph (a)(2)(vi) and adding a new paragraph (a)(2)(v);

■ c. Revising newly redesignated paragraph (a)(2)(vi); and

■ d. Adding a new paragraph (d).

The revised and added text to read as follows:

10.001 Policy.

(a) * * *

(2) * * *

(v) Before awarding a task or delivery order under an indefinite-delivery-indefinite-quantity (ID/IQ) contract (e.g., GWACs, MACs) for a noncommercial item in excess of the simplified acquisition threshold (10 U.S.C. 2377(c)); and

(vi) On an ongoing basis, take advantage (to the maximum extent practicable) of commercially available market research methods in order to effectively identify the capabilities of small businesses and new entrants into Federal contracting that are available in the marketplace for meeting the requirements of the agency in furtherance of—

(A) A contingency operation or defense against or recovery from nuclear, biological, chemical, or radiological attack; and

(B) Disaster relief to include debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief activities. (See 26.205).

* * * * *

(d) See 44.402(a)(2) and 52.244-6 (Alternate I) for the requirement for a prime contractor to perform market research in contracts in excess of \$5 million for the procurement of items other than commercial items.

■ 3. Amend section 10.002 by revising paragraph (b)(1) introductory text to read as follows:

10.002 Procedures.

* * * * *

(b) * * *

(1) The extent of market research will vary, depending on such factors as urgency, estimated dollar value, complexity, and past experience. The contracting officer may use market research conducted within 18 months before the award of any task or delivery order if the information is still current, accurate, and relevant. Market research involves obtaining information specific to the item being acquired and should include—

* * * * *

PART 44—SUBCONTRACTING POLICIES AND PROCEDURES

■ 4. Amend section 44.303 by redesignating paragraphs (a) through (i) as paragraphs (b) through (j), respectively, and adding a new paragraph (a) to read as follows:

44.303 Extent of review.

* * * * *

(a) The results of market research accomplished;

* * * * *

■ 5. Revise section 44.400 to read as follows:

44.400 Scope of subpart.

This subpart prescribes the policies limiting the contract clauses a contractor may be required to apply to any subcontractors that are furnishing commercial items or commercial components in accordance with Section 8002(b)(2) of Public Law 103-355 and Section 826 of Public Law 110-181 (10 U.S.C. 2377(c)).

■ 6. Amend section 44.402 by redesignating paragraphs (b) and (c) as paragraphs (c) and (d), respectively, and adding a new paragraph (b) to read as follows:

44.402 Policy requirements.

* * * * *

(b) Under a contract that is over \$5 million for the procurement of items other than commercial items, and under which the contractor is acting as a purchasing agent for the Government with respect to a purchase that exceeds the simplified acquisition threshold, the contractor shall, to the maximum extent practicable, conduct market research to determine—

(1) If commercial items or, to the extent commercial items suitable to meet the agency's needs are not available, nondevelopmental items are available that—

(i) Meet the agency's requirements;

(ii) Could be modified to meet the agency's requirements; or

(iii) Could meet the agency's requirements if those requirements were modified to a reasonable extent; and

(2) The extent to which commercial items or nondevelopmental items could be incorporated at the component level.

* * * * *

■ 7. Revise section 44.403 to read as follows:

44.403 Contract clause.

(a) The contracting officer shall insert the clause at 52.244-6, Subcontracts for Commercial Items, in solicitations and contracts other than those for commercial items.

(b) The contracting officer shall use the clause with its Alternate I when the acquisition value is in excess of \$5 million.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 8. Amend section 52.244-6 by revising the introductory text and adding Alternate I to read as follows:

52.244-6 Subcontracts for Commercial Items.

As prescribed in 44.403(a), insert the following clause:

* * * * *

Alternate I (JUN 2010). As prescribed in 44.403(b), the Contracting Officer shall substitute the following paragraph (d) for paragraph (d) of the base clause, and add the following paragraph (e):

(d) The Contractor shall include the terms of this clause, including this paragraph (d), but not including paragraph (e), in subcontracts awarded under this contract.

(e) To the maximum extent practicable, when the Contractor acts as a purchasing agent for the Government with respect to a purchase that exceeds the simplified acquisition threshold, the Contractor shall conduct market research (10 U.S.C. 2377(c)) to—

(i) Determine if commercial items or, to the extent commercial items suitable to meet the agency's needs are not available, nondevelopmental items are available that—

(A) Meet the agency's requirements;

(B) Could be modified to meet the agency's requirements; or

(C) Could meet the agency's requirements if those requirements were modified to a reasonable extent; and

(ii) Determine the extent to which commercial items or nondevelopmental items could be incorporated at the component level.

[FR Doc. 2010-14213 Filed 6-15-10; 8:45 am]

BILLING CODE 6820-EP-S

DEPARTMENT OF DEFENSE**GENERAL SERVICES ADMINISTRATION****NATIONAL AERONAUTICS AND SPACE ADMINISTRATION****48 CFR Parts 12, 13, 14, 15, and 52**

[FAC 2005-42; FAR Case 2009-011; Item VI; Docket 2009-0012, Sequence 1]

RIN 9000-AL20

Federal Acquisition Regulation; FAR Case 2009-011, American Recovery and Reinvestment Act of 2009 (Recovery Act)—GAO/IG Access

AGENCIES: Department of Defense (DoD), General Services Administration (GSA),

and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) have adopted as final, with changes, the interim rule amending the Federal Acquisition Regulation (FAR) to implement the American Recovery and Reinvestment Act of 2009 (Recovery Act) with respect to sections 902, 1514, and 1515.

DATES: *Effective Date:* July 16, 2010.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Edward N. Chambers, Procurement Analyst, at (202) 501-3221. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755. Please cite FAC 2005-42, FAR Case 2009-011.

SUPPLEMENTARY INFORMATION:**A. Background**

The Councils published an interim rule in the **Federal Register** at 74 FR 14646 on March 31, 2009, to implement the Recovery Act with respect to sections 902, 1514, and 1515. Technical amendments to the interim rule were published in the **Federal Register** at 74 FR 22810 on May 14, 2009. The interim rule added alternate clauses to FAR 52.214-26 "Audit and Records—Sealed Bidding", FAR 52.212-5 "Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items", and FAR 52.215-2 "Audit and Records—Negotiation".

Further, the interim rule amended FAR 12.504(a)(7) for contracts using Recovery Act funds to apply 41 U.S.C. 254d(c) and 10 U.S.C. 2313(c), Examination of Records of Contractor, to commercial item subcontracts which are otherwise exempt when subcontractors are not required to provide cost or pricing data.

Comments were received from 5 respondents. The Councils considered the comments received and concluded that the interim rule, as revised by the technical amendments, should be converted to a final rule with minor changes to the clause prescriptions.

The comments received are addressed as follows:

1. Scope of records that can be examined.

Comment: A respondent states that the language in FAR 52.212-5(d)(i) and FAR 52.212-5(d)(ii) is unnecessarily broad by not limiting the scope of records that can be examined by the

Inspector General (IG) to only those records related or funded with Recovery Act funds. The respondent made the same comment with regard to the scope of the IG examination of records in FAR 52.214–26(c)(2) Alternate I and 52.215–2(d)(1) Alternate I. Likewise, a respondent expressed concern that the interim rule is not clear whether it applies only to task orders that are funded with Recovery Act funds.

Response: Section 902 of the Recovery Act provides that each contract awarded using funds made available by the Recovery Act shall provide the Comptroller General, and his representatives, with the access specified in the statutory provision. Section 1515 provides that each contract awarded using covered funds shall provide the appropriate IG with the access specified in the statutory provision. The Councils have revised the clause prescriptions to clarify that “contract,” as defined in FAR 2.101, may mean bilateral contract modification or an individual task or delivery order. In the case of a bilateral modification that will use funds appropriated or otherwise made available by the Recovery Act, the contracting officer shall specify the applicability of the Recovery Act to that modification. In the case of a task- or delivery-order contract in which not all orders will use funds appropriated or otherwise made available by the Recovery Act, the contracting officer will specify the task or delivery orders to which the Recovery Act applies.

2. Advance notice.

Comment: A respondent states that they believe an IG must provide reasonable advance notice to contractors and their employees before a review of contractor transactions to include when and where the review and interviews will occur; the topics to be covered; the employees affected; and the total amount of time required to conduct the review.

Response: The Councils disagree. The purpose of this rule is to put contractors on notice that they may need to make their records and employees available in the event a review is requested. The FAR is an acquisition regulation and the exact review procedures that the Comptroller General or his authorized representatives use to execute such procedures are not required to be detailed in the FAR.

3. Rights of contractor employees.

Comment: A respondent is concerned that the rule is silent on the protection of the rights of employees subject to an interview. The respondent recommends

clearly outlining the rights of contractor employees to include prescribing the right to have counsel present during the interviews and clearly spelling out the process that the Government Accountability Office (GAO)/IG will use in both notifying employees of the intent to interview and the process to be followed.

Response: The Councils disagree. The FAR does not prescribe GAO processes or grant legal rights to contractors regarding GAO/IG interview processes.

4. IG authority to interview subcontractor employees.

Comment: A respondent commented that while they generally support the rule, they feel that the rule failed to include an IG authority to interview subcontractor employees.

Response: The Councils disagree. The FAR rule follows the statute. The Councils do not find evidence that there was an inadvertent omission in the statute with reference to allowing an IG to interview subcontractor employees.

5. Technical amendments.

Comment: A respondent believes that there are overlapping changes between this case and the Whistleblower case, FAR 2009–012, with respect to FAR clause 52.212–5, Alternate II. This same comment was made by a second respondent recommending the inclusion of the Whistleblower case in FAR clause 52.212–5, Alternate II.

Response: The Councils agree. FAC 2005–032, Technical Amendments, reconciled this issue by adding the Whistleblower reference to Alternate II of FAR 52.212–5.

6. Outside scope of this case.

a. Comment: A respondent commented that the application of reporting requirements is overly broad and recommends exempting contracts at or below the simplified acquisition threshold, commercial item contracts, and Commercially available off-the-shelf (COTS) contracts from the reporting requirements.

Response: Reporting requirements are covered under FAR Case 2009–009.

b. Comment: A respondent commented that FAR 12.504(a)(7) incorrectly states that 41 U.S.C. 254(c) and 10 U.S.C. 2313(c) are required “when a subcontractor is not required to provide cost or pricing data”.

Response: This comment does not address a change made by this rule. The comment may be taken under consideration for appropriateness as a future case.

c. Comment: A respondent notes that if FAR 52.203–15 is intended to be

flowed down to commercial item subcontractors, then it should also be included in the list of clauses under FAR 52.244–6.

Response: This comment is not directed at changes made under this rule and does not require a change to FAR Case 2009–011.

This is a significant regulatory action and, therefore, was subject to Office of Management and Budget (OMB) review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Applicability to Commercial Item contracts

Section 8003 of Pub. L. 103–355, the Federal Acquisition Streamlining Act (FASA) (41 U.S.C. 430), governs the applicability of laws to commercial items, and is intended to limit the applicability of laws to commercial items. The FASA provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for commercial items. The same applies for subcontracts for commercial items.

Therefore, given sections 902 and 1515 of the Recovery Act, which requires Comptroller General and agency inspector general access to contractor and subcontractor records, the FAR Council has determined that the rule should apply to commercial items, as defined at FAR 2.101, both at the prime and subcontract levels.

C. Applicability to commercially available off-the-shelf (COTS) item contracts

Section 4203 of Pub. L. 104–106, the Clinger-Cohen Act of 1996 (41 U.S.C. 431), governs the applicability of laws to the procurement of COTS items, and is intended to limit the applicability of laws to them. The Clinger-Cohen Act provides that if a provision of law contains criminal or civil penalties, or if the Administrator for Federal Procurement Policy makes a written determination that it is not in the best interest of the Federal Government to exempt COTS item contracts, the provision of law will apply.

Therefore, given sections 902 and 1515 of the Recovery Act, which requires Comptroller General and agency IG access to contractor and subcontractor records, the Administrator for Federal Procurement Policy, has determined that the rule

should apply to COTS item contracts, as defined at FAR 2.101.

D. Applicability to Contracts at or Below the Simplified Acquisition Threshold

Section 4101 of Pub. L. 103–355, the Federal Acquisition Streamlining Act (FASA) (41 U.S.C. 429), governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to them. The FASA provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council (FARC) makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the simplified acquisition threshold, the law will not apply to them. Therefore, given sections 902 and 1515 of the Recovery Act, which requires Comptroller General and agency IG access to contractor and subcontractor records, the FARC has determined that this rule should apply to contracts or subcontracts at or below the simplified acquisition threshold, as defined at FAR 2.101.

E. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because it merely requires contractors to make available existing records of transactions covered by the Recovery Act. Contractors are not obligated to create additional records.

F. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the OMB under 44 U.S.C. chapter 35, *et seq.*

List of Subjects in 48 CFR Parts 12, 13, 14, 15, and 52

Government procurement.

Dated: June 2, 2010.

Edward Loeb,

Acting Director, Acquisition Policy Division.

■ Accordingly, the interim rule published in the **Federal Register** at 74 FR 14646 on March 31, 2009, is adopted as a final rule with the following changes:

■ 1. The authority citation for 48 CFR parts 12, 13, 14, 15, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 2. Amend section 12.301 by revising paragraph (b)(4)(ii) to read as follows:

12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(b) * * *

(4) * * *

(ii)(A) If the acquisition will use funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5), the contracting officer shall use the clause with its Alternate II.

(B)(1) In the case of a bilateral contract modification that will use funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009, the contracting officer shall specify applicability of Alternate II to that modification.

(2) In the case of a task- or delivery-order contract in which not all orders will use funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009, the contracting officer shall specify the task or delivery orders to which Alternate II applies.

(C) The contracting officer may not use Alternate I when Alternate II applies.

* * * * *

PART 14—SEALED BIDDING

■ 3. Amend section 14.201–7 by revising paragraph (a)(2) to read as follows:

14.201–7 Contract clauses.

(a) * * *

(2)(i) If the acquisition will use funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009, use the clause with its Alternate I in all solicitations and contracts.

(ii)(A) In the case of a bilateral contract modification that will use funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009, the contracting officer shall specify applicability of Alternate I to that modification.

(B) In the case of a task- or delivery-order contract in which not all orders will use funds appropriated or

otherwise made available by the American Recovery and Reinvestment Act of 2009, the contracting officer shall specify the task or delivery orders to which Alternate I applies.

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

■ 4. Amend section 15.209 by revising paragraph (b)(2) to read as follows:

15.209 Solicitation provisions and contract clauses.

* * * * *

(b) * * *

(2)(i) When using funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5)—

(A) The exceptions in paragraphs (b)(1)(i) through (b)(1)(iii) are not applicable; and

(B) Use the clause with its Alternate I.

(ii)(A) In the case of a bilateral contract modification that will use funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009, the contracting officer shall specify applicability of Alternate I to that modification.

(B) In the case of a task- or delivery-order contract in which not all orders will use funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009, the contracting officer shall specify the task or delivery orders to which Alternate I applies.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.214–26 [Amended]

■ 5. Amend section 52.214–26 in the introductory text by removing “14.201–7(a)” and adding “14.201–7(a)(1)” in its place; and removing from Alternate I introductory text “14.201–7(a)(2)” and adding “14.201–7(a)(2),” in its place. [FR Doc. 2010–14170 Filed 6–15–10; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 22, 25, and 52**

[FAC 2005–42; FAR Case 2009–014; Item VII; Docket 2009–0027, Sequence 1]

RIN 9000–AL34

**Federal Acquisition Regulation; FAR
Case 2009–014, New Designated
Country—Taiwan**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have adopted as final, without change, an interim rule amending the Federal Acquisition Regulation (FAR) to add Taiwan (known in the World Trade Organization as “the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei)”) as a designated country, due to the accession of Taiwan to membership in the World Trade Organization Agreement on Government Procurement.

DATES: *Effective Date:* June 16, 2010.

FOR FURTHER INFORMATION CONTACT: Ms. Lori Sakalos, Procurement Analyst, at (202) 208–0498, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–42, FAR Case 2009–014.

SUPPLEMENTARY INFORMATION:**A. Background**

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 74 FR 40461 on August 11, 2009. On July 15, 2009, Taiwan became a designated country based on its accession to the World Trade Organization Agreement on Government Procurement. The interim rule added Taiwan to the list of World Trade Organization Government Procurement Agreement countries in FAR sections 22.1503, 25.003, 52.222–19, 52.225–5, 52.225–11, and 52.225–23. No comments were received as a result of the interim rule.

This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of Executive Order

12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because, although this rule opens up Government procurement to the goods and services of Taiwan, the Councils do not anticipate any significant economic impact on U.S. small businesses. The Department of Defense only applies the trade agreements to the non-defense items listed at DFARS 225.401–70, and acquisitions that are set aside for small businesses are exempt.

C. Paperwork Reduction Act

The Paperwork Reduction Act does apply; because the final rule affects the certification and information collection requirement in the provision at FAR 52.225–11 currently approved under OMB Control Number 9000–0141, Buy American Act—Construction. The impact, however, is negligible.

List of Subjects in 48 CFR Parts 22, 25, and 52

Government procurement.

Dated: June 2, 2010.

Edward Loeb,

Acting Director, Acquisition Policy Division.

Interim Rule Adopted as Final Without Change

■ Accordingly, the interim rule amending 48 CFR parts 22, 25, and 52, which was published in the **Federal Register** at 74 FR 40461 on August 11, 2009, is adopted as a final rule without change.

[FR Doc. 2010–14173 Filed 6–15–10; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Part 25**

[FAC 2005–42; FAR Case 2009–013; Item VIII; Docket 2009–0026; Sequence 1]

RIN 9000–AL40

**Federal Acquisition Regulation; FAR
Case 2009–013, Nonavailable Articles**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are issuing a final rule amending the Federal Acquisition Regulation (FAR) to revise the list of articles determined to be domestically nonavailable.

DATES: *Effective Date:* July 16, 2010.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Cecelia L. Davis, Procurement Analyst, at (202) 219–0202. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–42, FAR Case 2009–013.

SUPPLEMENTARY INFORMATION:**A. Background**

The Buy American Act does not apply with respect to articles, materials, or supplies if articles, materials, or supplies of the class or kind to be acquired, either as end items or components, are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

A domestic nonavailability determination has been made for the articles listed in FAR 25.104(a). As stated at FAR 25.103, this determination does not necessarily mean that there is no domestic source for the listed items, but that domestic sources can only meet 50 percent or less of total U.S. Government and nongovernment demand. Before acquisition of an article on the list, the procuring agency is responsible for conducting market research appropriate to the circumstances, including seeking domestic sources.

The Councils published a proposed rule in the **Federal Register** at 74 FR 39597 on August 7, 2009. The Councils received no public comments. Therefore, the Councils are adding “Yeast, active dry and instant active dry.”, and “Pineapple, canned.”, to the list of nonavailable articles at 25.104(a). The list is further corrected to read “Modacrylic fiber” in lieu of “Modacrylic fur ruff”, as explained in the proposed rule.

In addition, as required by FAR 25.104(b), the entire list of nonavailable articles was published for public comment. Because no public comments were received, there will be no further changes to the list at this time.

This is not a significant regulatory action and, therefore, was not subject to review under section 6 of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the Councils have not identified any domestic small businesses that can fulfill the Government's requirements for the added items.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. chapter 35, *et seq.*

List of Subjects in 48 CFR part 25

Government procurement.

Dated: June 2, 2010.

Edward Loeb,

Acting Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 25 as set forth below:

PART 25—FOREIGN ACQUISITION

■ 1. The authority citation for 48 CFR part 25 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

25.104 [Amended]

■ 2. Amend section 25.104 in paragraph (a) by removing the article “Modacrylic

fur ruff.” and adding “Modacrylic fiber.” in its place; and adding, in alphabetical order, the articles “Pineapple, canned.” and “Yeast, active dry and instant active dry.”.

[FR Doc. 2010-14176 Filed 6-15-10; 8:45 am]

BILLING CODE 6820-EP-S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 30 and 52

[FAC 2005-42; FAR Case 2009-025; Item IX; Docket 2010-0087, Sequence 1]

RIN 9000-AL58

Federal Acquisition Regulation; FAR Case 2009-025, Disclosure and Consistency of Cost Accounting Practices for Contracts Awarded to Foreign Concerns

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to align the FAR with the revised Cost Accounting Standards (CAS) Board clause, Disclosure and Consistency of Cost Accounting Practices-Foreign Concerns.

DATES: *Effective Date:* June 16, 2010.

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat on or before August 16, 2010 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005-42, FAR Case 2009-025, by any of the following methods:

* Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2009-025” under the heading “Enter Keyword or ID” and selecting “Search”. Select the link “Submit a Comment” that corresponds with “FAR Case 2009-025”. Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “FAR Case 2009-025” on your attached document.

* Fax: 202-501-4067.

* Mail: General Services

Administration, Regulatory Secretariat (MVCB), 1800 F Street, NW., Room 4041, ATTN: Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005-42, FAR Case 2009-025, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Edward N. Chambers, Procurement Analyst, at (202) 501-3221 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-42, FAR Case 2009-025.

SUPPLEMENTARY INFORMATION:

A. Background

On March 26, 2008, the CAS Board published a final rule in the **Federal Register** at 73 FR 15939 to utilize the clause, Disclosure and Consistency of Cost Accounting Practices-Foreign Concerns, in CAS-covered contracts and subcontracts awarded to foreign concerns.

In order to maintain consistency between CAS and FAR in matters relating to the administration of CAS, the Councils are amending the FAR as follows:

1. FAR 30.201-4(c)(1) and (2), the prescription for use of FAR clause 52.230-4 is revised to reflect the amendments promulgated by the CAS Board on March 26, 2008.

2. FAR 30.201-4(d) is revised to include use of FAR clause 52.230-6, Administration of Cost Accounting Standards, in all contracts containing FAR clause 52.230-4 which is necessary based upon changes promulgated by the CAS Board on March 26, 2008.

3. FAR clause 52.230-4 is replaced in its entirety and re-titled “Disclosure and Consistency of Cost Accounting Practices—Foreign Concerns” to reflect the amendments promulgated by the CAS Board on March 26, 2008.

4. FAR clause 52.230-6, Administration of Cost Accounting Standards, is revised to include reference to FAR clause 52.230-4 based on changes promulgated by the CAS Board on March 26, 2008.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Councils do not expect this interim rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because contracts and subcontracts with small businesses are exempt from the application of the Cost Accounting Standards. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

The Councils will also consider comments from small entities concerning the existing regulations in parts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005-42, FAR Case 2009-025) in all correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. chapter 35, *et seq.*

D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator of the National Aeronautics and Space Administration that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because this rule implements a final rule promulgated by the CAS Board which went into effect on April 25, 2008. Further, the CAS Board rule already went through the public rulemaking process. However, pursuant to Public Law 98-577 and FAR 1.501-3(b), the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 30 and 52

Government procurement.

Dated: June 2, 2010.

Edward Loeb,

Acting Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 30 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 30 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 30—COST ACCOUNTING STANDARDS ADMINISTRATION

■ 2. Amend section 30.201-4 by revising paragraph (c), and removing from paragraph (d)(1) “(b), or (e)” and adding “(b), (c), or (e)” in its place. The revised text to read as follows:

30.201-4 Contract clauses.

* * * * *

(c) *Disclosure and Consistency of Cost Accounting Practices—Foreign Concerns.* (1) The contracting officer shall insert the clause at 52.230-4, Disclosure and Consistency of Cost Accounting Practices—Foreign Concerns, in negotiated contracts with foreign concerns, unless the contract is otherwise exempt from CAS (see 48 CFR 9903.201-1). Foreign concerns do not include foreign governments or their agents or instrumentalities.

(2) The clause at 52.230-4 requires the contractor to comply with 48 CFR 9904.401 and 48 CFR 9904.402 to disclose (if it meets certain requirements) actual cost accounting practices, and to follow consistently its disclosed and established cost accounting practices.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Revise section 52.230-4 to read as follows:

52.230-4 Disclosure and Consistency of Cost Accounting Practices—Foreign Concerns.

As prescribed in 30.201-4(c), insert the following clause:

DISCLOSURE AND CONSISTENCY OF COST ACCOUNTING PRACTICES—FOREIGN CONCERNS (JUN 2010)

(a) The Contractor, in connection with this contract, shall—

(1) Comply with the requirements of 48 CFR 9904.401, Consistency in Estimating, Accumulating, and Reporting Costs; and 48 CFR 9904.402, Consistency in Allocating Costs Incurred for the Same Purpose, in effect on the date of award of this contract, as indicated in 48 CFR 9904.

(2) (*Cost Accounting Standard (CAS)–covered Contracts Only*). If it is a business unit of a company required to submit a Disclosure Statement, disclose in writing its cost accounting practices as required by 48 CFR 9903.202-1 through 48 CFR 9903.202-5. If the

Contractor has notified the Contracting Officer that the Disclosure Statement contains trade secrets and commercial or financial information which is privileged and confidential, the Disclosure Statement shall be protected and shall not be released outside of the U.S. Government.

(3)(i) Follow consistently the Contractor's cost accounting practices. A change to such practices may be proposed, however, by either the U.S. Government or the Contractor, and the Contractor agrees to negotiate with the Contracting Officer the terms and conditions under which a change may be made. After the terms and conditions under which the change is to be made have been agreed to, the change must be applied prospectively to this contract, and the Disclosure Statement, if affected, must be amended accordingly.

(ii) The Contractor shall, when the parties agree to a change to a cost accounting practice and the Contracting Officer has made the finding required in 48 CFR 9903.201-6(c) that the change is desirable and not detrimental to the interests of the U.S. Government, negotiate an equitable adjustment as provided in the Changes clause of this contract. In the absence of the required finding, no agreement may be made under this contract clause that will increase costs paid by the U.S. Government.

(4) Agree to an adjustment of the contract price or cost allowance, as appropriate, if the Contractor or a subcontractor fails to comply with the applicable CAS or to follow any cost accounting practice, and such failure results in any increased costs paid by the U.S. Government. Such adjustment shall provide for recovery of the increased costs to the U.S. Government, together with interest thereon computed at the annual rate established under section 6621(a)(2) of the Internal Revenue Code of 1986 (26 U.S.C. 6621(a)(2)) for such period, from the time the payment by the U.S. Government was made to the time the adjustment is effected.

(b) If the parties fail to agree whether the Contractor has complied with an applicable CAS rule, or regulation as specified in 48 CFR 9903 and 48 CFR 9904 and as to any cost adjustment demanded by the U.S. Government, such failure to agree will constitute a dispute under the Contract Disputes Act (41 U.S.C. 601).

(c) The Contractor shall permit any authorized representatives of the U.S. Government to examine and make copies of any documents, papers, and records relating to compliance with the requirements of this clause.

(d) The Contractor shall include in all negotiated subcontracts, which the Contractor enters into, the substance of this clause, except paragraph (b), and shall require such inclusion in all other subcontracts of any tier, except that—

(1) If the subcontract is awarded to a business unit which pursuant to 48 CFR 9903.201-2 is subject to other types of CAS coverage, the substance of the applicable clause prescribed in FAR 30.201-4 shall be inserted.

(2) This requirement shall apply only to negotiated subcontracts in excess of \$650,000.

(3) The requirement shall not apply to negotiated subcontracts otherwise exempt from the requirement to include a CAS clause as specified in 48 CFR 9903.201-1.

(End of clause)

■ 4. Amend section 52.230-6 by revising the date of the clause; the second sentence of the introductory text of paragraph (b); the first sentence of paragraph (b)(3); the introductory text of paragraph (b)(4); paragraph (k)(1); the introductory text of paragraph (l); and paragraph (n) to read as follows:

52.230-6 Administration of Cost Accounting Standards.

* * * * *

ADMINISTRATION OF COST ACCOUNTING STANDARDS (JUN 2010)

* * * * *

(b) * * * If a change in cost accounting practice is implemented without submitting the notice required by this paragraph, the CFAO may determine the change to be a failure to follow paragraph (a)(2) of the clause at FAR 52.230-2, Cost Accounting Standards; paragraph (a)(4) of the clause at FAR 52.230-3, Disclosure and Consistency of Cost Accounting Practices; paragraph (a)(4) of the clause at FAR 52.230-4, Disclosure and Consistency of Cost Accounting Practices—Foreign Concerns; or paragraph (a)(2) of the clause at FAR 52.230-5, Cost Accounting Standards—Educational Institution.

* * * * *

(3) For any change in cost accounting practices proposed in accordance with paragraph (a)(4)(ii) or (iii) of the clauses at FAR 52.230-2 and FAR 52.230-5; or with paragraph (a)(3) of the clauses at FAR 52.230-3 and FAR 52.230-4, submit a description of the change not less than 60 days (or such other date as may be mutually agreed to by the CFAO and the Contractor) before implementation of the change. * * *

(4) Submit a description of the change necessary to correct a failure to comply with an applicable CAS or to follow a disclosed practice (as contemplated by

paragraph (a)(5) of the clause at FAR 52.230-2 and FAR 52.230-5; or by paragraph (a)(4) of the clauses at FAR 52.230-3 and FAR 52.230-4)—

* * * * *

(k) * * *

(1) Contract modifications to reflect adjustments required in accordance with paragraph (a)(4)(ii) or (a)(5) of the clauses at FAR 52.230-2 and 52.230-5; or with paragraph (a)(3)(i) or (a)(4) of the clauses at FAR 52.230-3 and FAR 52.230-4; and

* * * * *

(l) For all subcontracts subject to the clauses at FAR 52.230-2, 52.230-3, 52.230-4, or 52.230-5—

* * * * *

(n) For subcontracts containing the clause or substance of the clause at FAR 52.230-2, FAR 52.230-3, FAR 52.230-4, or FAR 52.230-5, require the subcontractor to comply with all Standards in effect on the date of award or of final agreement on price, as shown on the subcontractor's signed Certificate of Current Cost or Pricing Data, whichever is earlier.

[FR Doc. 2010-14175 Filed 6-15-10; 8:45 am]

BILLING CODE 6820-EP-S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 31

[FAC 2005-42; FAR Case 2009-026; Item X; Docket 2010-0088, Sequence 1]

RIN 9000-AL54

Federal Acquisition Regulation; FAR Case 2009-026, Compensation for Personal Services

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are issuing an interim rule amending the FAR to align the FAR with the revised Cost Accounting Standards (CAS) Board standards 412, "Cost Accounting Standard for composition and measurement of pension cost;" and 415, "Accounting for the cost of deferred compensation."

DATES: Effective Date: June 16, 2010.

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat on or before August 16, 2010 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005-42, FAR Case 2009-026, by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting "FAR Case 2009-026" under the heading "Enter Keyword or ID" and selecting "Search". Select the link "Submit a Comment" that corresponds with "FAR Case 2009-026". Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "FAR Case 2009-026" on your attached document.

- Fax: 202-501-4067.

- Mail: General Services

Administration, Regulatory Secretariat (MVCB), 1800 F Street, NW., Room 4041, ATTN: Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005-42, FAR Case 2009-026, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Edward N. Chambers, Procurement Analyst, at (202) 501-3221. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-42, FAR Case 2009-026.

SUPPLEMENTARY INFORMATION:

A. Background

The CAS Board published a final rule in the **Federal Register** at 73 FR 23961 on May 1, 2008, to amend CAS 412, "Cost Accounting Standard for composition and measurement of pension cost," and CAS 415, "Accounting for the cost of deferred compensation." The CAS Board specified that the accounting of Employee Stock Ownership Plan (ESOP) costs, regardless of type, would be covered by the provisions of CAS 415 only and not by CAS 412. The CAS Board also provided criteria in CAS 415 for measuring ESOP costs and assigning these costs to cost accounting periods. In order to maintain consistency between CAS and FAR in matters relating to the administration of CAS, the Councils are amending the FAR as follows:

1. FAR 31.205–6(q)(2)(i) is deleted in its entirety to reflect the amendments promulgated by the CAS Board on May 1, 2008.

2. FAR 31.205–6(q)(2)(ii) through (vi) are redesignated as paragraphs FAR 31.205–6(q)(2)(i) through (v) due to the deletion of the existing FAR 31.205–6(q)(2)(i).

3. Redesignated FAR 31.205–6(q)(2)(i) is revised to reflect the amendments promulgated by the CAS Board on May 1, 2008.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Councils do not expect this interim rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because affected small businesses are currently required to comply with CAS 412 and CAS 415. While small businesses are otherwise not subject to CAS, they are subject to selected standards for the purpose of determining allowability of costs under Government contracts. Among these standards are CAS 412 and CAS 415 as set forth in FAR 31.205–6(q). For small businesses currently using CAS 415, there will be no increase in cost or effort. For small businesses that must change from CAS 412 to CAS 415, the possible change from measuring costs in accordance with CAS 412 to CAS 415 would result, at most, in a negligible increase in administrative burden because of the similarities between CAS 412 and 415. The potential increase of administrative effort, albeit minor, will be offset by the uniformity and consistency in accounting for deferred compensation costs achieved by this rule that will benefit all entities by reducing their administrative burden. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

The Councils will also consider comments from small entities concerning the existing regulations in FAR part 31 affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005–42, FAR Case 2009–026) in all correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. chapter 35, *et seq.*

D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator of the National Aeronautics and Space Administration that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because this rule implements a final rule promulgated by the CAS Board, which went into effect on June 2, 2008. Further, the CAS Board rule already gone through the public rulemaking process. However, pursuant to Public Law 98–577 and FAR 1.501–3(b), the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Part 31

Government procurement.

Dated: June 2, 2010.

Edward Loeb,

Acting Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 31 as set forth below:

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

■ 1. The authority citation for 48 CFR part 31 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

■ 2. Amend section 31.205–6 by removing paragraph (q)(2)(i); redesignating paragraphs (q)(2)(ii) through (q)(2)(vi) as paragraphs (q)(2)(i) through (q)(2)(v), respectively; and revising the newly redesignated (q)(2)(i) to read as follows:

31.205–6 Compensation for personal services.

* * * * *

(q) * * *

(2) * * *

(i) The contractor measures, assigns, and allocates costs in accordance with 48 CFR 9904.415.

* * * * *

[FR Doc. 2010–14181 Filed 6–15–10; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 52 and 53

[FAC 2005–42; FAR Case 2009–018; Item XI; Docket 2010–0082, Sequence 1]

RIN 9000–AL53

Federal Acquisition Regulation; FAR Case 2009–018, Payrolls and Basic Records

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to revise the FAR clause, Payrolls and Basic Records. This revision implements a Department of Labor rule to protect the privacy of workers.

DATES: *Effective Date:* June 16, 2010.

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat on or before August 16, 2010 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–42, FAR Case 2009–018, by any of the following methods:

• Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2009–018” under the heading “Enter Keyword or ID” and selecting “Search”. Select the link “Submit a Comment” that corresponds with “FAR Case 2009–018”. Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “FAR Case 2009–018” on your attached document.

• Fax: 202–501–4067.

• Mail: General Services

Administration, Regulatory Secretariat (MVCB), 1800 F Street, NW., Room 4041, ATTN: Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005–42, FAR Case 2009–018, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>.

www.regulations.gov, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Ernest Woodson, Procurement Analyst, at (202) 501-3775. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-42, FAR Case 2009-018.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule incorporates changes from the Department of Labor's (DOL) final rule, *Protecting the Privacy of Workers: Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction*, published in the **Federal Register** at 73 FR 77504 on December 19, 2008, that removed the requirement to submit complete social security numbers and home addresses of individual workers in weekly payroll submissions. The DOL concluded that such disclosure of personal information from the prime contractor was unnecessary and created an increased risk of privacy violations.

B. Discussion

As a result of the changes that DOL instituted regarding the submission of payroll data, the clause at FAR 52.222-8, *Payrolls and Basic Records*, is revised to delete the requirement for submission of full social security numbers and home addresses of individual workers from the prime contractor on weekly transmittals. Instead the payrolls shall only need to include an individually identifying number for each employee (e.g., the last four digits of the employee's social security number). The information may be submitted in any form desired, but this rule provides a link to the DOL's Wage and Hour Division website where Optional Form WH-347 is available for the purpose of submitting payroll information. The rule requires contractors and subcontractors to maintain the full social security number and current address of each covered worker, and shall provide them upon request to the contracting officer, the contractor, or the Wage and Hour Division of the DOL for purposes of an investigation or audit of compliance with prevailing wage requirements.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, *Regulatory Planning and Review*, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

C. Regulatory Flexibility Act

The Councils do not expect this interim rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because this rule provides relief for contractors from submitting more personal information than is necessary in the weekly payroll submissions and will not impose any measurable costs on contractors. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

The Councils will also consider comments from small entities concerning the existing regulations in parts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005-42, FAR Case 2009-018) in all correspondence.

D. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under the Office of Management and Budget (OMB) Control Number 1215-0149, assigned to the DOL. The interim rule affects the certification and information collection requirements in the provisions at FAR 52.222-8(b)(1) and 53.303-WH-347. The impact of this requirement will not impose any measurable costs on any private or public sector entity. As stated in the DOL rule, the Department believes that a reduction in the amount of information required on certified payrolls provided weekly under the Davis-Bacon Act is a reduction in regulatory compliance costs. While some contractors may have to slightly reconfigure their systems to produce the revised version, most have access to computerized systems that can easily be revised to remove data. Those contractors who currently use the Optional Form WH-347 will actually have an overall decrease of total administrative costs. The DOL published a notice in the **Federal Register** at 74 FR 2862 on January 16, 2009, announcing that the OMB approved the DOL information collection request titled "Protecting the Privacy of Workers: Labor Standards Provisions Applicable to Contracts Covering Federally Financed and

Assisted Construction, Effectiveness of Information Collection Requirements".

E. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the DOL has already published a final rule in the **Federal Register** at 73 FR 77504 on December 19, 2008, deleting the requirement for submission of full social security numbers and home addresses of employees as part of weekly payroll submissions for prime contractors. The effective date of the DOL rule was January 18, 2009. However, pursuant to Public Law 98-577 and FAR 1.501-3(b), the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 52 and 53

Government procurement.

Dated: June 2, 2010.

Edward Loeb,

Acting Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 52 and 53 as set forth below:

■ 1. The authority citation for 48 CFR parts 52 and 53 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 2. Amend section 52.222-8 by revising the date of the clause and paragraph (b)(1) to read as follows:

52.222-8 Payrolls and Basic Records.

* * * * *

PAYROLLS AND BASIC RECORDS (JUN 2010)

* * * * *

(b)(1) The Contractor shall submit weekly for each week in which any contract work is performed a copy of all payrolls to the Contracting Officer. The payrolls submitted shall set out accurately and completely all of the information required to be maintained under paragraph(a) of this clause, except that full social security numbers and home addresses shall not be included on weekly transmittals. Instead the payrolls shall only need to include an

individually identifying number for each employee (*e.g.*, the last four digits of the employee's social security number). The required weekly payroll information may be submitted in any form desired. Optional Form WH-347 is available for this purpose and may be obtained from the U.S. Department of Labor Wage and Hour Division website at <http://www.dol.gov/whd/forms/wh347.pdf>. The Prime Contractor is responsible for the submission of copies of payrolls by all subcontractors.

Contractors and subcontractors shall maintain the full social security number and current address of each covered worker, and shall provide them upon request to the Contracting Officer, the Contractor, or the Wage and Hour Division of the Department of Labor for purposes of an investigation or audit of compliance with prevailing wage requirements. It is not a violation of this section for a Prime Contractor to require a subcontractor to provide addresses and social security numbers to the

Prime Contractor for its own records, without weekly submission to the Contracting Officer.

* * * * *

PART 53—FORMS

■ 3. Amend section 53.303-WH-347 by revising the form to read as follows:

53.303-WH-347 Department of Labor Form WH-347, Payroll (For Contractor's Optional Use).

BILLING CODE 6820-EP-S



PAYROLL
(For Contractor's Optional Use; See Instructions at www.dol.gov/esa/whd/forms/wh347instr.htm)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

Rev. Dec. 2008

OMB No.: 1215-0149
Expires: 12/31/2011

ADDRESS

NAME OF CONTRACTOR ☐ OR SUBCONTRACTOR ☐

PAYROLL NO.

FOR WEEK ENDING

PROJECT AND LOCATION

PROJECT OR CONTRACT NO.

(1) NAME AND INDIVIDUAL IDENTIFYING NUMBER (e.g., LAST FOUR DIGITS OF SOCIAL SECURITY NUMBER) OF WORKER	(2) NO. OF EXEMPTIONS WITHHOLDINGS	(3) WORK CLASSIFICATION	OT OR ST.	(4) DAY AND DATE							(5) TOTAL HOURS	(6) RATE OF PAY	(7) GROSS AMOUNT PAID EARNED	(8) DEDUCTIONS					(9) NET WAGES PAID FOR WEEK
														FICA	WITH- HOLDING TAX		OTHER	TOTAL DEDUCTIONS	
				HOURS WORKED EACH DAY															
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While completion of Form WH-347 is optional, it is mandatory for covered contractors and subcontractors performing work on Federally financed or assisted construction contracts to respond to the Information collection contained in 29 C.F.R. §§ 3.3, 5.5(a). The Copeland Act (40 U.S.C. § 3145) requires contractors and subcontractors performing work on Federally financed or assisted construction contracts to "furnish weekly a statement with respect to the wages paid each employee during the preceding week." U.S. Department of Labor (DOL) regulations at 29 C.F.R. § 5.5(e)(3)(iii) require contractors to submit weekly a copy of all payrolls to the Federal agency contracting for or financing the construction project, accompanied by a signed "Statement of Compliance" indicating that the payrolls are correct and complete and that each laborer or mechanic has been paid not less than the proper Davis-Bacon prevailing wage rate for the work performed. DOL and federal contracting agencies receiving this information review the information to determine that employees have received legally required wages and fringe benefits, or otherwise have been paid not less than the proper Davis-Bacon prevailing wage rate for the work performed. DOL and federal contracting agencies receiving this information review the information to determine that employees have received legally required wages and fringe benefits.

Public Burden Statement

We estimate that it will take an average of 55 minutes to complete this collection, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding these estimates or any other aspect of this collection, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, ESA, U.S. Department of Labor, Room S5502, 200 Constitution Avenue, N.W.

(over)

(b) WHERE FRINGE BENEFITS ARE PAID IN CASH

☐ — Each laborer or mechanic listed in the above referenced payroll has been paid, as indicated on the payroll, an amount not less than the sum of the applicable basic hourly wage rate plus the amount of the required fringe benefits as listed in the contract, except as noted in section 4(c) below.

(c) EXCEPTIONS

EXCEPTION (CRAFT)	EXPLANATION

REMARKS:

SIGNATURE

NAME AND TITLE

THE WILLFUL FALSIFICATION OF ANY OF THE ABOVE STATEMENTS MAY SUBJECT THE CONTRACTOR OR SUBCONTRACTOR TO CIVIL OR CRIMINAL PROSECUTION. SEE SECTION 1001 OF TITLE 18 AND SECTION 231 OF TITLE 31 OF THE UNITED STATES CODE.

Date _____

I, _____ (Name of Signatory Party) _____ (Title)

do hereby state:

(1) That I pay or supervise the payment of the persons employed by

_____ (Contractor or Subcontractor) _____ on the

_____ (Building or Work) _____; that during the payroll period commencing on the

_____ day of _____, and ending the _____ day of _____,

all persons employed on said project have been paid the full weekly wages earned, that no rebates have been or will be made either directly or indirectly to or on behalf of said

_____ (Contractor or Subcontractor) _____ from the full

weekly wages earned by any person and that no deductions have been made either directly or indirectly from the full wages earned by any person, other than permissible deductions as defined in Regulations, Part 3 (29 C.F.R. Subtitle A), issued by the Secretary of Labor under the Copeland Act, as amended (48 Stat. 948, 63 Stat. 108, 72 Stat. 967; 40 U.S.C. § 3145), and described below:

(2) That any payrolls otherwise under this contract required to be submitted for the above period are correct and complete, that the wage rates for laborers or mechanics contained therein are not less than the applicable wage rates contained in any wage determination incorporated into the contract; that the classifications set forth therein for each laborer or mechanic conform with the work he performed.

(3) That any apprentices employed in the above period are duly registered in a bona fide apprenticeship program registered with a State apprenticeship agency recognized by the Bureau of Apprenticeship and Training, United States Department of Labor, or if no such recognized agency exists in a State, are registered with the Bureau of Apprenticeship and Training, United States Department of Labor.

(4) That:

(a) WHERE FRINGE BENEFITS ARE PAID TO APPROVED PLANS, FUNDS, OR PROGRAMS

☐ — In addition to the basic hourly wage rates paid to each laborer or mechanic listed in the above referenced payroll, payments of fringe benefits as listed in the contract have been or will be made to appropriate programs for the benefit of such employees, except as noted in section 4(c) below.

[FR Doc. 2010-14182 Filed 6-15-10; 8:45 am]

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DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 31, 49 and 52****[FAC 2005-42; Item XII; Docket 2010-0078;
Sequence 2]****Federal Acquisition Regulation;
Technical Amendments****AGENCIES:** Department of Defense (DoD),
General Services Administration (GSA),
and National Aeronautics and Space
Administration (NASA).**ACTION:** Final rule.**SUMMARY:** This document makes
amendments to the Federal Acquisition
Regulation in order to make editorial
changes.**DATES:** *Effective Date:* June 16, 2010.**FOR FURTHER INFORMATION CONTACT:** The
Regulatory Secretariat, 1800 F Street,
NW., Room 4041, Washington, DC,
20405, (202) 501-4755, for information
pertaining to status or publication
schedules. Please cite FAC 2005-42,
Technical Amendments.**SUPPLEMENTARY INFORMATION:** This
document makes amendments to the
Federal Acquisition Regulation in order
to make editorial changes.**List of Subjects in 48 CFR Parts 31, 49,
and 52**

Government procurement.

Dated: June 2, 2010.

Edward Loeb,*Acting Director, Acquisition Policy Division.*■ Therefore, DoD, GSA, and NASA
amend 48 CFR parts 31, 49, and 52 as
set forth below:■ 1. The authority citation for 48 CFR
parts 31, 49, and 52 continues to read
as follows:**Authority:** 40 U.S.C. 121(c); 10 U.S.C.
chapter 137; and 42 U.S.C. 2473(c).**PART 31—CONTRACT COST
PRINCIPLES AND PROCEDURES****31.205-6 [Amended]**■ 2. Amend section 31.205-6 by
removing paragraph (o)(6).**31.205-16 [Amended]**■ 3. Amend section 31.205-16 by
removing the last sentence of paragraph
(c).**PART 49—TERMINATION OF
CONTRACTS**■ 4. Amend section 49.505 by revising
paragraph (a) and the last sentence of
paragraph (b) to read as follows:**49.505 Other termination clauses.**(a) *Personal service contracts.* The
contracting officer shall insert the clause
at 52.249-12, Termination (Personal
Services), in solicitations and contracts
for personal services (see Part 37).(b) * * * The contracting officer shall
also insert the clause in time-and-
material contracts, and labor-hour
contracts.

* * * * *

**PART 52—SOLICITATION PROVISIONS
AND CONTRACT CLAUSES****52.222-34 [Amended]**■ 5. Amend section 52.222-34 by
removing from paragraph (d) of
Alternate I “provision” and adding
“clause” in its place.

[FR Doc. 2010-14185 Filed 6-15-10; 8:45 am]

BILLING CODE 6820-EP-S

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Chapter 1****[Docket FAR 2010-0077, Sequence 4]****Federal Acquisition Regulation;
Federal Acquisition Circular 2005-42;
Small Entity Compliance Guide****AGENCIES:** Department of Defense (DoD),
General Services Administration (GSA),
and National Aeronautics and Space
Administration (NASA).**ACTION:** Small Entity Compliance Guide.**SUMMARY:** This document is issued
under the joint authority of the
Secretary of Defense, the Administrator
of General Services and the
Administrator of the National
Aeronautics and Space Administration.
This *Small Entity Compliance Guide* has
been prepared in accordance with
section 212 of the Small Business
Regulatory Enforcement Fairness Act of
1996. It consists of the summaries of the
rules appearing in Federal Acquisition
Circular (FAC) 2005-42 which amends
the Federal Acquisition Regulation
(FAR). Interested parties may obtain
further information regarding this rule
by referring to FAC 2005-42 which
precedes this document. These
documents are also available via the
Internet at <http://www.regulations.gov>.**FOR FURTHER INFORMATION CONTACT:** The
analyst whose name appears in the table
below. Please cite FAC 2005-42 and the
specific FAR case number. For
information pertaining to status or
publication schedules, contact the FAR
Secretariat at (202) 501-4755.**RULES LISTED IN FAC 2005-42**

Item	Subject	FAR case	Analyst
I	American Recovery and Reinvestment Act (the Recovery Act) of 2009—Whistleblower Protections	2009-012	Parnell.
II	Electronic Subcontracting Reporting System (eSRS)	2005-040	Cundiff.
III	American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Publicizing Contract Ac- tions.	2009-010	Jackson.
IV	Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts—Section 844 of the National Defense Authorization Act for Fiscal Year 2008.	2008-003	Woodson.
V	Additional Requirements for Market Research (Interim)	2008-007	Blankenship.
VI	American Recovery and Reinvestment Act of 2009 (Recovery Act)—GAO/IG Access	2009-011	Chambers.
VII	New Designated Country—Taiwan	2009-014	Sakalos.
VIII	Nonavailable Articles	2009-013	Davis.
IX	Disclosure and Consistency of Cost Accounting Practices for Contracts Awarded to Foreign Con- cerns (Interim).	2009-025	Chambers.
X	Compensation for Personal Services (Interim)	2009-026	Chambers.
XI	Payrolls and Basic Records (Interim)	2009-018	Woodson.

RULES LISTED IN FAC 2005-42—Continued

Item	Subject	FAR case	Analyst
XII	Technical Amendments.		

SUPPLEMENTARY INFORMATION:

Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2005-42 amends the FAR as specified below:

Item I—American Recovery and Reinvestment Act (the Recovery Act) of 2009—Whistleblower Protections (FAR Case 2009-012)

This rule adopts as final, with changes, an interim rule published in the **Federal Register** at 74 FR 14633 on March 31, 2009, amending the FAR to implement the American Recovery and Reinvestment Act of 2009 (the Recovery Act) with respect to section 1553 of Division A, Protecting State and Local Government and Contractor Whistleblowers. This rule prohibits non-Federal employers from discharging, demoting, or discriminating against an employee as a reprisal for disclosing information.

Item II—Electronic Subcontracting Reporting System (eSRS)(FAR Case 2005-040)

This rule amends the Federal Acquisition Regulation (FAR) to adopt as final, with changes, an interim FAR rule published in the **Federal Register** at 73 FR 21779 on April 22, 2008, amending the FAR to implement the use of the Electronic Subcontracting Reporting System (eSRS) to fulfill small business subcontracting reporting requirements. The eSRS, a web-based system, replaces the Standard Forms 294 and 295 as the mechanism for submitting reports required by the small business subcontracting program. In addition, this rule adds a new Alternate III to FAR clause 52.219-9 to recognize that there is a circumstance under which contractors will need to use SF 294, rather than eSRS, to submit an Individual Subcontract Report. The contractor will use SF 294 if a contract is not reported in the Federal Procurement Data System because reporting it in that system may disclose information that would compromise national security.

Item III—American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Publicizing Contract Actions (FAR Case 2009-010)

This rule adopts as final, with minor changes, the interim rule published in the **Federal Register** at 74 FR 14636 on March 31, 2009. The interim rule amended the FAR to implement section 6.2 of the Office of Management and Budget (OMB) Memorandum M-09-10, dated February 18, 2009, entitled “Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009” (the Recovery Act). Section 6.2 of the OMB guidance mandates accountability and transparency relative to publicizing contract actions. The OMB guidance requires that the FAR be amended to reflect—

1. Unique requirements for posting of pre-solicitation notices;
2. Unique requirements for announcing contract awards;
3. Unique requirements for entering awards into the Federal Procurement Data System (FPDS); and
4. Unique requirements for actions that are not fixed-price or competitive.

OMB Memorandum M-09-15, dated April 3, 2009, entitled “Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009,” supplements, amends, and clarifies the initial guidance in OMB Memorandum M-09-10. The final rule makes the following amendments:

- FAR 5.704(a)(2) to clarify that modifications of orders are not required to be publicized at the preaward stage.
- FAR 5.704(b) to require contracting officers to identify proposed contract actions, funded in whole or in part by the Recovery Act, by using the instructions that are at FAR 5.704(b) and available in the Recovery FAQs at the GPE <https://www.fedbizopps.gov>.
- FAR 5.704(c) and 5.705(a) to ensure that the description required by FAR 5.207(a)(16) clearly defines the elements of the requirement to the general public.
- FAR 5.705(b) to require contracting officers to include in the description of the contract action a statement specifically noting if the action was not awarded competitively, or was not fixed-price, or was neither competitive nor fixed-price.

Item IV—Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts—Section 844 of the National Defense Authorization Act for Fiscal Year 2008 (FAR Case 2008-003)

This final rule adopts, with changes, an interim rule published in the **Federal Register** at 74 FR 2731 on January 15, 2009. The rule amends the FAR to implement the requirements of Section 844 of the National Defense Authorization Act for Fiscal Year 2008. The interim rule required the head of an executive agency to make certain justification and approval documents relating to the use of noncompetitive procedures in Federal contracting be posted on the website of an agency and through FedBizOpps. The final rule requires that if the justification is a brand name justification under FAR 6.302-1(c) then it must be posted with the solicitation. Justifications must remain posted for a minimum of 30 days. The final rule clarifies that posting the justification does not apply if it would disclose the executive agency's needs and disclosure of such needs would compromise national security or create other security risks. The final rule also establishes procedures at FAR 13.501 similar to procedures at FAR 6.305. The rule is intended to enhance competition in Federal contracting and provide greater transparency to the taxpayer.

Item V—Additional Requirements for Market Research (FAR Case 2008-007) (Interim)

This interim rule amends the FAR at parts 10, 44, and 52 by adding market research requirements. This change implements Section 826 of Pub. L. 110-181, the National Defense Authorization Act for Fiscal Year 2008 (FY08 NDAA). As a matter of policy, this provision of law is applied to contracts awarded by all executive agencies. This rule requires that market research must be accomplished before an agency places an indefinite-delivery/indefinite-quantity (ID/IQ) task or delivery order in excess of the simplified acquisition threshold. In addition, a prime contractor with a contract in excess of \$5 million for the procurement of items other than commercial items is required to conduct market research before making purchases that exceed the

simplified acquisition threshold when the contractor is acting as a purchasing agent for the Government. This interim rule is applicable to any solicitations issued and contracts (to include any subcontracts issued under such contracts) awarded on or after the effective date of the rule.

Item VI—American Recovery and Reinvestment Act of 2009 (Recovery Act)—GAO/IG Access (FAR Case 2009–011)

This final rule adopts, with changes, the interim rule published in the **Federal Register** at 74 FR 14646 on March 31, 2009. This final rule amends the FAR to implement sections 902, 1514, and 1515 of the American Recovery and Reinvestment Act of 2009 (Recovery Act). Collectively, these sections provide for the audit and review of both contracts and subcontracts, and the ability to interview such contractor and subcontractor personnel under contracts containing Recovery Act funds.

These Recovery Act provisions are implemented in new alternate clauses to FAR 52.212–5 “Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items” and FAR 52.214–26 “Audit and Records—Sealed Bidding,” and by amending FAR 52.215–2 “Audit and Records—Negotiation.” For the Comptroller General, these alternate clauses provide specific authority to audit contracts and subcontracts and to interview contractor and subcontractor employees under contracts using Recovery Act funds. Agency Inspector Generals receive the same authorities, with the exception of interviewing subcontractor employees.

The changes to the interim rule clarify its application to supplemental agreements, and orders under task- or delivery-order contracts, involving Recovery Act funds.

Item VII—New Designated Country—Taiwan (FAR Case 2009–014)

This final rule adopts as final, without change, an interim rule implementing the designation of Taiwan under the World Trade Organization Agreement on Government Procurement, which took effect on July 15, 2009. This FAR change allows contracting officers to purchase goods and services made in Taiwan without application of the Buy American Act if the acquisition is

covered by the World Trade Organization Agreement on Government Procurement.

Item VIII—Nonavailable Articles (FAR Case 2009–013)

This final rule amends FAR 25.104(a) to add certain items to the list of articles not available from domestic sources in sufficient and reasonably available commercial quantities of a satisfactory quality. This case is based on extensive market research by the Defense Logistics Agency. Unless the contracting officer learns before the time designated for receipt of bids in sealed bidding or final offers in negotiation that an article on the list is available domestically in sufficient and reasonably available quantities of a satisfactory quality, the Buy American Act does not apply to acquisition of these items as end products, and the contracting officer may treat foreign components of the same class or kind as domestic components.

Item IX—Disclosure and Consistency of Cost Accounting Practices for Contracts Awarded to Foreign Concerns (FAR Case 2009–025) (Interim)

This interim rule amends the FAR to align the existing FAR clause 52.230–4 with the changes made in Cost Accounting Standards (CAS) Board clause, Disclosure and Consistency of Cost Accounting Practices—Foreign Concerns.

On March 26, 2008, the CAS Board published, without change from the proposed rule (72 FR 32829, June 14, 2007), a final rule in the **Federal Register** at 73 FR 15939 to utilize the clause, Disclosure and Consistency of Cost Accounting Practices—Foreign Concerns, in CAS-covered contracts and subcontracts awarded to foreign concerns. This rule is necessary in order to maintain consistency between CAS and FAR in matters relating to the administration of CAS.

Item X—Compensation for Personal Services (FAR Case 2009–026) (Interim)

This interim rule amends the FAR to align the existing FAR 31.205(q)(2)(i) and (ii) with the changes made in Cost Accounting Standards (CAS) Board Standards 412, “Cost Accounting Standard for composition and measurement of pension cost,” and 415, “Accounting for the cost of deferred compensation.” Formerly, the applicable CAS standard for measuring, assigning,

and allocating the costs of Employee Stock Ownership Plans (ESOPs) depended on whether the ESOP met the definition of a pension plan at FAR 31.001. Costs for ESOPs meeting the definition of a pension plan at FAR 31.001 were covered by CAS 412, while the costs for ESOPs not meeting the definition of a pension plan at FAR 31.001 were covered by CAS 415. Now, regardless of whether an ESOP meets the definitions of a pension plan at FAR 31.001, all costs of ESOPs are covered by CAS 415.

Item XI—Payrolls and Basic Records (FAR Case 2009–018) (Interim)

This interim rule implements changes that the Department of Labor (DOL) instituted regarding the submission of payroll data in their final rule, Protecting the Privacy of Workers: Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction, published in the **Federal Register** at 73 FR 77504 on December 19, 2008. The rule revises FAR 52.222–8, Payrolls and Basic Records, to delete the requirement for submission of full social security numbers and home addresses of individual workers, prime contractor, on weekly payroll transmittals as required on covered construction contracts. The rule requires contractors and subcontractors to maintain the full social security number and current address of each covered worker, and shall provide them upon request to the contracting officer, the contractor, or the Wage and Hour Division of the DOL for purposes of an investigation or audit of compliance with prevailing wage requirements. The rule recognizes DOL’s finding that complete social security numbers and home addresses for individual workers is personal information to the worker and that any unnecessary disclosure and submittal of such information creates an exposure to identity theft and the invasion of privacy for workers.

Item XII—Technical Amendments

Editorial changes have been made at FAR 31.205–6, 31.205–16, 49.505, and 52.222–34.

Dated: June 2, 2010.

Edward Loeb,

Acting Director, Acquisition Policy Division.

[FR Doc. 2010–14186 Filed 6–15–10; 8:45 am]

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